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PALMER, M. S. R. State-owned Enterprise accountability...



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MATTHEW PALMER

ACKNOWLEDGEMENTS

***State-Owned Enterprise
Accountability:
An Economic Analysis of
Politics and Profit***

Research Paper for Administrative Law
LL.M. (LAWS 501)

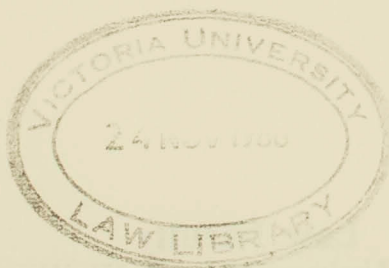
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Wellington 1987

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Policies and Profit

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ACKNOWLEDGEMENTS

My supervisors, Professor Ken Keith and Dr. Bob Dugan have offered significant guidance to the direction of the paper.

Acknowledgements are also due to my father, Geoffrey Palmer, for his advice, criticism and access to resources. Various other people and organisations have provided helpful material and comments. They include Mr Peter Dunne MP, Professor John Roberts, The Information Authority, The New Zealand Treasury, Mr Douglas Hodgson and others.

My wife Anne has been a constant source of emotional and intellectual support, forbearance and understanding.

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"An Act to promote improved performance in respect of Government trading activities and, to this end, to -

- (a) Specify principles governing the operation of State enterprises; and*
- (b) Authorise the formation of companies to carry on certain Government activities and control the ownership thereof; and*
- (c) Establish requirements about the accountability of State enterprises, and the responsibility of Ministers"*

-Long title, State-Owned Enterprises Act 1986.

I. INTRODUCTION

The reform of state-owned enterprises (SOEs) is a hot topic in New Zealand legal, economic, political, accounting and business circles. It marks a new stage in the development of New Zealand's constitution and economy. Large state trading organisations were previously operated as government departments subject to direct and complete ministerial control. Waste, decline, stagnation and inefficiency were the perceived results. The fourth Labour Government have undertaken a comprehensive search for a more appropriate balance between public accountability and financial efficiency. This is the fundamental tension at the heart of the SOE issue. The second half of 1987 sees a consolidation in the reform process. The State-Owned Enterprises Act 1986 (SOEs Act) is in force. It has already been amended by Parliament and actions under it have been challenged in the Court of Appeal. Nine new SOEs and four established SOEs are operating under it. With the re-election of the Labour Government the process of reform continues. More institutions are to become candidates for corporatisation, some for privatisation.¹

Proponents of the reforms claim advantages such as enhanced efficiency and accountability in state activity. Critics claim a loss of accountability and social objectives and decry a failure to privatise. All agree that the issue is of primary importance: how should the state organise the management of its enterprises that have commercial functions? As the process of reform temporarily draws breath it is time to examine the reformed structure in the light of the fundamental issues it addresses. What is it? How does it work? Is it "adequate"? Where does the future lie?

This paper examines the new SOEs that have been created. It examines the accountability structure that governs their activities. This refers to the framework of mechanisms which surrounds all the actors involved in the operation of an SOE. The

¹ Hon. Stan Rodger, Speech to the Institute of Policy Studies, 3 September 1987, Wellington.

impact of these mechanisms on the behaviour of the actors, as motivated by their incentives, determines the shape of the practical operation of the SOEs. That operation constitutes the outcome of the reform process that will be judged as a success or failure. In this way it is the accountability structure and process of the SOEs that is pivotal to the success of this "bold new experiment".²

Much of the substance of the paper is descriptive; inherently so as the aim is to understand the accountability structure. Yet the economic method of analysis used to present the accountability structure illuminates and clarifies the issues and relationships and suggests policy implications.

Part II outlines the methodological and conceptual approach of the paper and some background information about SOEs. Part III describes and analyses the accountability structure of SOEs in terms of four key, complex elements that together constitute its essence. An economic approach is applied to each to examine the effect of specific mechanisms that, combined with motive incentives, determine the process of accountability. Part IV analyses the overall effect of the elements and incentives analysed in Part III to formulate a broad picture of the accountability process. Part V draws brief conclusions about policy implications of the analysis and, more broadly, about the methodological approach used.

²

Geoffrey Palmer, *Unbridled Power: An Interpretation of New Zealand's Constitution and Government*, (2nd ed., Oxford University Press, Auckland) 90.

II. ECONOMICS, ACCOUNTABILITY AND THE GREAT EXPERIMENT

A. ECONOMICS AND ACCOUNTABILITY

The approach and structure of the paper are heavily influenced by economics, as has been much of the fundamental analysis behind the development of the SOEs.³ The "economic approach" is used throughout.⁴ This way of thinking about issues emphasises the incentives faced by individuals, especially as modified by law and by practical impediments to behaviour. It need not involve money or finance, nor mathematics, nor need it exhibit a "right wing" bias. Instead the application of economic analysis will often seem to the reader to be applied common sense; which is the essence of economics.

The basic economic tools used in the paper are straightforward. Together they lead to a particular view of human behaviour. Economics expects humans to act rationally; or least to act rationally enough for overall behaviour patterns to approximate rationality. Concomitant to this, economics expects humans to maximise their utility. We behave in ways that we hope will increase our happiness and minimise our misery. The economic concept of "cost" is important. Cost is not confined to money but includes any expenditure of a valuable resource. For example the time and difficulty involved in passing legislation represents a cost. Cost also includes the value of alternative uses of a resource: the opportunity cost. The value of the alternative activities that could be undertaken by the people and resources engaged in passing legislation is the opportunity cost of their deployment. Note that transactions may be costly - this is important to the paper. Law also plays a vital role in influencing activities. It defines the property rights framework within which market activity is to occur. Its mechanisms can be used to channel behaviour into desired patterns. For example it can economise on transaction costs or raise the costs of undesirable activities.

³ For example: The Treasury, *Economic Management*, (Government Printer, Wellington, 1984) Ch. 13; R.L. Cameron & P.J. Duignan "Government Owned Enterprises: Theory, Performance and Efficiency" Paper to the New Zealand Association of Economists Conference, 8 February 1984, (Wellington).

⁴ Further explicated by the writer in "The economics of law: The Sharebrokers Act 1908" (1986) 16 V.U.W.L.R. 277. Also, see Gary S. Becker, *The Economic Approach to Human Behaviour* (University of Chicago Press, Chicago, 1976); Richard A. Posner, *Economic Analysis of Law*, (Little, Brown & Co., Boston, 1986); C.G. Veljanovski *The New Law-and-Economics: A Research Review* (Centre for Socio-Legal Studies, Oxford, 1982); and *infra* n.5.

The application of economics to SOEs is vitally concerned with the behaviour of the actors involved in the SOE process. It is concerned with the incentives they face and the relevant mechanisms which channel their behaviour. From a full account of those incentives and mechanisms the behaviour of the actors and thus the dynamics of their interrelationships overall can be predicted. It is in this way that the paper uses the term "accountability". Accountability emphasises the relationship between actors concerning matters over which they have influence. An accountability structure determines and describes the loci of power. It may include a framework of formal or informal rules. It takes account of the effects of incentives on, and perceptions of the actors. An accountability structure is a constitution, broadly defined. The paper examines the constitution of SOEs in that sense.

The paper is written in the belief that economics alone does not provide answers. Conclusions are always reached and decisions made on the basis of judgement, philosophy and personal values. Yet economics may clarify causal relationships and improve the basis on which debate may occur and informed decisions may be made. Interrelationships may be clarified, influences identified, problems pinpointed. The value of the approach lies in the logical, systematic and thorough discipline that is imposed on policy analysis by its proper use. For these reasons and others, "Law and Economics" is acquiring increasing influence as an almost discrete discipline.⁵

B. SOES: THE TENSION OF POLITICS AND PROFIT

The essence of the accountability structure of SOEs is examined in Part III. It consists of a number of mechanisms that channel the behaviour of actors involved in the SOE process: ministerial responsibility; Parliamentary scrutiny; company law; judicial review; and other elements. Logically prior to this analysis is an account of the motive incentives which drive the behaviour of the actors. The two basic motive incentives most relevant to SOEs are the exercise of political power and the attainment of financial profit. Each represents a fundamental way in which humans can increase their utility in New Zealand society, through the political and commercial systems respectively. Both of these systems can be characterised in similar terms, using a key concept relevant to the paper as a whole: transaction cost and agency cost theory of the principal - agent relationship.

⁵ See: *The Journal of Law and Economics* (Chicago); *The Journal of Legal Studies* (Chicago); *The International Review of Law and Economics* (pan-atlantic); *The Journal of Law, Economics and Organization* (Yale).

1. *Profit and Production*

The world of production, distribution and exchange of goods and services in New Zealand relies on the profit motive. Generally, the price mechanism adjusts the incentives of producers and consumers to allocate resources to their best use - as evidenced by willingness to pay for them. Actors in the production process generally behave so as to maximise their profit. Usually this is achieved by operation of firms, often companies. Economic analysis provides insights into the *raison d'être* of such organisations. If transactions were costless, individuals would transact with each other in the production of a good. There would be no reason for a company to exist.⁶ In reality, though, there are significant problems in all the participants in a production process transacting with each other and with the final buyer of the product. The transaction costs would be prohibitive in a modern economy.

Since transactions are costly, there is an incentive to set up an organisational alternative to market transactions. A company, (or any other form of corporate body) governs arrangements for the production of the good. It internalises transaction costs. Consider the functions that a company may perform. The company itself is a central body with which people can directly transact. Employees can be hired. Third parties - involved in input or output transactions - can contract with the company. Different organisational entities have different legal characteristics which may be advantageous for different activities. The utility of the company as a form of organisation emanates from its distinctive legal characteristics.

Yet the utility of any organisational alternative to atomistic market transactions may be limited by other costs. The owner of a company has a specific goal, usually profit maximisation. How is it to be achieved? Typically, different sets of individuals perform different functions in an organisation. In a company shareholders, as owners, delegate some power of management to directors as their agents. There is likely to be difficulty, a cost, involved in ensuring that the directors behave so as to further the aim of the shareholders. These are termed "agency costs". Significant economic analysis has focussed on the agency costs of this relationship. In 1932 Berle and Means published a seminal work which ruminated on the "divergence of interest between ownership and control".⁷ This was developed significantly in the 1970s and 1980s by

⁶ R.H. Coase "The Nature of the Firm" (1937) 4 *Economica* 386. Also, Steven Cheung "The Contractual Nature of the Firm" (1983) 26 *Journal of Law and Economics* 1.

⁷ Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (revised ed., Harcourt Brace & World Inc., New York, 1967) especially 112 - 116.

writers such as Fama and Jensen.⁸ Agency costs are important to this paper in several contexts.

In the commercial context there are several methods of economising on agency costs.⁹ Other actors may be important. Competition within the framework of market laws is intense for the acquisition of profit. The potential of a company takeover may result in replacement as director which provides an incentive to avoid inefficiency which would induce a takeover. Monitoring mechanisms are highly important in informing both the principal and other actors of divergence in interests (resulting in inefficiency) and providing the basis on which remedial action may be taken.

2. *Power and Politics*

Transactions costs and agency theory are also relevant in the world of politics. A government is characterised by this paper as an agent for New Zealand society as a whole - or the electorate. The power and influence attached, by the structure of the political system, to positions in a government is considerable. It must be expected to be keenly desired; whether for selfish or altruistic reasons. The primary incentive that members of a government face is to exercise power to achieve whatever are their aims. Theoretically subsidiary to this is the retention or acquisition of power in order to achieve those aims. This is the world of politics. Political costs and benefits constitute incentives. It is on this basis that ministers' aims are primarily political. As actors in the political marketplace they behave by responding to the incentives facing them, as actors do in other markets.

The discretion of government is absolute. Agency cost analysis stresses, indeed assumes, the need to align an agent's interests with the principal's interests to produce the behaviour desired by the principal. The potential agency costs to the electorate are enormous. In the political context, as in the commercial context, there are several methods of economising on agency costs. Other actors may be important. Competition within the framework of the political system is intense both for the exercise of and

⁸ Eugene F. Fama "Agency Problems and the Theory of the Firm" (1980) 88 *Journal of Political Economy* 288; Fama & Michael C. Jensen "Separation of Ownership and Control" (1983) 26 *Journal of Law and Economics* 26; Jensen & W.H. Meckling "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" (1976) 3 *Journal of Financial Economics* 305; Jensen & Richard Ruback "The Market for Corporate Control: The Scientific Evidence" (1983) 11 *Journal of Financial Economics* 11; Jensen & Jerold L. Zimmerman "Symposium on Management Compensation and the Managerial Labor Market in Honor of William H. Meckling" (1985) 7 *Journal of Accounting and Economics*; and also the Corporations and Private Property Conference (1983) 26 *Journal of Law and Economics* 235.

⁹ Ibid.

retention of power. The potential of takeover (of government) by another party provides an incentive to avoid unpopular actions which would induce a takeover. Again, monitoring mechanisms are highly important in informing both the principal and other actors of divergence in interests (resulting in unpopularity) and providing the basis on which remedial action may be taken.

3. *SOEs: The Great Experiment*

In both the commercial and political spheres the identification of agency costs is a matter of examining actors' incentives. Responses to agency costs are an inherent and fundamental part of the accountability structure of an organisation. They constitute the mechanisms by which one set of actors controls another. In the SOE context both spheres meet in several senses. The aims of an SOE may be both commercial and political. The behaviour of an SOE is relevant both commercially and politically. And the structure of the new SOEs now draws from both spheres. The mechanisms that control agency costs in each sphere are relevant to SOEs.

SOEs are inherently public in nature. They are part of government and may be used to achieve governmental purposes. Yet as trading enterprises they have another purpose - to operate commercially. This basic tension is at the heart of the SOE problem that lead to the present experiment and accountability structure.¹⁰ Politics and profit in New Zealand have not sat well together. The reasons for the new SOE reform are perceptions of enormous wastage by the pre-existing departmental trading organisations. Continuous and increasing losses, excess output and investment in some areas, and waiting lists for services in others, contrary management decisions: all were cited as products of an inadequate management system.¹¹ The new SOE structure is attempts to remedy that situation. It is based on four essential principles:¹²

- (a) Responsibility for non commercial functions will be separated from major trading SOEs.

¹⁰ R.C. Mascarenhas *Public Enterprise in New Zealand* (New Zealand Institute of Public Administration, Wellington, 1982) 128.

¹¹ Palmer, *supra* n. 2, 82 - 90; Roger Douglas and Louise Callen, *Toward Prosperity*, (David Bateman, Auckland, 1987) Ch. 12: "Polishing the Family Silver" 224. On the factual development of SOEs generally see: Peter McKinlay *Corporatisation: The Solution for State Owned Enterprise?* (Victoria University Press for the Institute of Policy Studies, Wellington, 1987); and Institute of Policy Studies, *Politicians, Public Servants and Public Enterprise: Revolution in Executive Power*, Papers Presented at the Seminar on 18 June 1987, (Victoria University of Wellington, 1987).

¹² Hon. R.O. Douglas, *Economic Statement to the House of Representatives*, 12 December 1985, (Government Printer, Wellington, 1985) 12.

- (b) Managers of SOEs will be given a principal objective of running them as successful business enterprises.
- (c) Managers will be given responsibility for decisions on the use of inputs and on pricing and marketing of their output within the performance objectives agreed with Ministers so that the managers can be held accountable to Ministers and Parliament for their results.
- (d) The advantages and disadvantages which SOEs have, including unnecessary barriers to competition, will be removed so that commercial criteria will provide a fair assessment of managerial performance.

An SOE is a limited liability company formed under the Companies Act 1955 and subject to an overlay of public accountability mechanisms through the SOEs Act 1986. Nine new SOEs have been created from what were departments, or parts of departments. The departmental comparison is a useful one to return to throughout the paper, as is the ordinary company. The nine new SOEs are:

Airways Corporation of New Zealand Ltd.	(Aircorp.)
Coal Corporation of New Zealand Ltd.	(Coalcorp)
Electricity Corporation of New Zealand Ltd.	(Electricorp)
Government Property Services Ltd.	(GPS)
Land Corporation Ltd.	(Landcorp)
New Zealand Forestry Corporation Ltd.	(Forestcorp)
New Zealand Post Ltd.	(NZ Post)
Post Office Bank Ltd.	(Postbank)
Telecom Corporation of New Zealand Ltd.	(Telecom)

Four existing enterprises are also brought within most aspects of the SOEs Act: Air New Zealand Ltd; New Zealand Railways Corporation; Tourist Hotel Corporation; and The Shipping Corporation.¹³ This paper is concerned only with the new SOEs.

Certain public regulatory functions, powers and duties are also conferred on new SOEs by legislation specific to each: the 18 Acts passed in June and July 1987 that were the State Enterprises Restructuring Bill.¹⁴ For example the Telecommunications Act 1987 confers powers and duties on Telecom in relation to Telecommunication Networks and the Licensing and Regulation of Radio Apparatus. This paper does not deal with the SOE specific legislation.

¹³ Petrocorp was removed from the list by the SOEs Amendment Act 1987.

¹⁴ These became the following 1987 Acts: the Civil Aviation Amendment (No.2) Act; Electricity Amendment Act; Electricity Operators Act; Ministry of Energy Amendment (No.2) Act; Public Works Amendment Act; Post Office Bank Act; Postal Services Act; Post Office Act Repeal Act; Telecommunications Act; State-Owned Enterprises Amendment Act; Forests Amendment Act; Forest and Rural Fires Amendment Act; Fire Service Amendment (No.5) Act; Health Service Personnel Act; New Zealand Railways Corporation Amendment Act; State Services Conditions of Employment Amendment (No.3) Act; State Service Amendment Act; and the Police Amendment (No.3) Act.

III. ELEMENTS OF THE ACCOUNTABILITY STRUCTURE

A. MINISTERIAL RESPONSIBILITY

1. *Introduction*

The doctrine of ministerial responsibility is the logical starting point of Part III.¹⁵ It lies at the heart of the accountability structure in the Westminster system of Government as an essential link in the chain that is supposed to join democratic will to government administration. Ministerial Responsibility focusses on the members of Cabinet; the body that has the most concentrated power in our political system. It links Cabinet to Parliament and to the electorate. Ministerial responsibility performs an integral role in the new accountability structure of SOEs. Furthermore, almost unaided, it was the core element of the unsatisfactory departmental accountability structure of previous state trading enterprises. Ministerial responsibility thus serves doubly as a basis for comparison with the previous structure as well as an important element in the new system.

Debate surrounds the concept of ministerial responsibility. Some of this is inevitable due to the often highly charged political implications of its application. In addition, though, there is confusion over the nature and content of the concept. Some question its definition, some its effectiveness, others its utility. This paper will explore the concept of ministerial responsibility through economic analysis. Its application to SOEs will reveal the effect of ministerial responsibility on the incentives of SOE actors.

2. *Ministerial Responsibility and Economics*

The character of the doctrine of individual ministerial responsibility is important. It belongs to that most ubiquitous feature of any constitution - conventions. The consequences of this are significant and lie predominantly in enforceability and susceptibility to change. Almost by definition, a convention is incapable of enforcement by the courts.¹⁶ Its power lies in the tradition of its observance, how appropriate it is to

¹⁵ Individual ministerial responsibility is most directly relevant to this paper though collective responsibility is important - *infra* p. 15-16.

¹⁶ *Per, e.g. Madzimbamuto v. Lardner-Burke* [1969] 1 A.C. 645, 723. Though a convention may be: recognised by statute; enacted into law; incorporated into a constitutional document; or recognised and relied on by the courts.

contemporary circumstances; it rests on public opinion and the political system.¹⁷ The price of breaching the convention is political cost. The substance of a convention may be changed or even negated simply by a (reasonably consistent)¹⁸ change in practice; without a conscious decision being necessary on anyone's part. During the period of a gradual shift however, the substance of the convention may be uncertain.

The substance of the doctrine of Ministerial Responsibility has been likened to the procreation of eels; with an accordingly slippery explanation:¹⁹

"Ministers offer their individual resignations if serious errors are made in their Departments (except when they retain their posts or are given peerages)" and "Every act of a civil servant is, legally speaking, the act of a Minister (except those that are, legally speaking, his own)."

Sir Ivor Jennings' description conveys the essence of the concept, but begs more questions than it answers:²⁰ "Each minister is responsible to Parliament for the conduct of his [or her] department". This paper presents ministerial responsibility in terms of two fundamental facets: the requirement to answer; and the consequences of answering.²¹ The first describes what it is that ministerial responsibility requires of a minister. The second describes the sanctions available for use against the minister. Both are presented in terms of economics.

(a) *The requirement to answer*

The requirement to answer is relatively clear. Ministerial responsibility requires that ministers must answer to Parliament in relation to the conduct of their departments and other matters over which they acquire (by law or convention) functions, powers or duties. The matters for which a minister has responsibility are examined later with respect to SOEs. Requirements to act are also seen as elements or corollaries of the requirement to answer: to investigate, remedy and report back. This paper treats most

¹⁷ This paper does not delve into the question of why conventions are enforced. It should be noted though that a wide view of what constitutes a convention is taken.

¹⁸ A convention may be breached occasionally without ceasing to exist or changing significantly.

¹⁹ Geoffrey Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1984) 55.

²⁰ Sir Ivor Jennings, *The Law and the Constitution* (5th ed., University of London Press Ltd., London, 1959), 207-208. Professor Finer noted that issues may be raised about the meaning of "minister", "responsible" and "department"! S.E. Finer, "The Individual Responsibility of Ministers" (1956) 34 *Public Administration* 377.

²¹ This broadly corresponds to Professor Finer's two senses of "responsibility": "answerable to" and "answerable for". Ibid., 379. His labels can cause confusion, for example see Avigdor Klagsbald, in "The Kahan Commission of Inquiry: Jurisdiction and Standards in Determining Questions of Ministerial Responsibility" (1983) *Public Law* 376, 381, for a different interpretation of their meaning.

of these as consequences of the requirement to answer that are induced by political incentives.

The ways in which a minister answers to Parliament are several. They include, for example: the charge a minister has in Parliament of a departmental Bill; the role of the minister in debates on any aspect of the department; the response by a minister to requests by Members of Parliament in relation to the department; Parliamentary Questions of the minister in relation to the department; the role of officials as servants of their minister at select committee hearings.²² A more detailed examination of Parliamentary accountability mechanisms is presented in Part III.B. Within the self imposed limits of parliamentary procedure ministerial responsibility theoretically enables Parliament to hold ministers to account by obtaining information, monitoring and scrutinising. The existence of ministerial responsibility in many ways permeates the whole context and flavour of Parliamentary behaviour.

An important corollary to this part of the convention of ministerial responsibility concerns officials.²³ Strictly, officials are anonymous. They are responsible only to their ministers who are bound to protect and defend them, but they are directed by the minister.²⁴ This derives from the same theoretical basis as the convention proper, viz. that, responsibility is channelled totally through the minister. Increasingly, there has been confusion over the exact extent and force of the corollary - perhaps evidence of a change in the convention? Officials are sometimes not defended in Parliament or in public.²⁵ There have even been instances of public attacks on officials by their own ministers.²⁶ There are increasingly important implications in these trends for the duty of loyalty owed by officials.²⁷

²² In relation to the last point, and unlike almost any other context, officials also have a duty to the committee. M.C. Probine, "The Public Service and Ministers" Management Leaflet No 6, (State Services Commission, Wellington, 1983). See also David McGee *Parliamentary Practice in New Zealand* (Government Printer, Wellington, 1985) 208 about official loyalty being overridden by direct accountability to Parliament in this way.

²³ Generally, see John Roberts *Politicians, Public Servants & Public Enterprise: Restructuring the New Zealand Government Executive* (Victoria University Press for the Institute of Policy Studies, Wellington, 1987).

²⁴ And regulated by the State Services Commission.

²⁵ R.J. Polaschek *Government Administration in New Zealand* (Oxford University Press, London, 1958).

²⁶ John Roberts *supra* n. 23, 48-50.

²⁷ See generally: Roberts *supra* n. 23, Maurice Wright "Ministers and Civil Servants: Relations and Responsibilities" (1977) 30 *Parliamentary Affairs* 293; David Butler "Ministerial Responsibility in Australia and Britain" (1973) 26 *Parliamentary Affairs* 403; J.L. Roberts "The Public Service and Ministers" (1983) 6 *Public Sector* 25.

This requirement of ministerial responsibility governs the relationships between Parliament, ministers and officials. It can be characterised in economic terms.²⁸ Prohibitive transaction costs would occur from Parliament being responsible for the administration of the legislation it makes. A bureaucracy of officials is necessary to carry out that function. Yet, as explained in relation to organisations generally, there would be significant agency costs to Parliament in supervising such a bureaucracy. A narrower agency relationship substitutes: ministers are the agents of the "sovereign" Parliament.²⁹ They control and direct officials who in turn are answerable mainly to ministers. In the same way that directors are responsible to shareholders in a company, ministers are responsible to Parliament in a principal - agent relationship. The doctrine of ministerial responsibility controls the agency costs that still exist in the Parliament - minister - officials relationships. Ministerial responsibility is essentially a broad reporting requirement. Parliament may require a report from a minister on any matter over which the minister has "responsibility". This provides an incentive for ministers to take into account Parliament's wishes.

(b) *The consequences of answering*

A description of the consequences of answering is more contentious. Yet it is essential to the efficacy of ministerial responsibility as a agency cost control device. It constitutes the sanction for breach of the rules of the agency relationship. Attention usually focusses on whether the convention requires resignation and whether resignation actually occurs. This paper treats that focus as unbalanced and as merely part of the more significant overall view of the incentives provided by political cost.

The most obvious and notorious sanction against ministerial misbehaviour is resignation. When must a minister resign?³⁰ Sir Ivor Jennings's identification of three requirements in establishing the existence and content of a convention is convincing and was adopted by the Supreme Court of Canada in 1981.³¹ The elements are: precedents; the beliefs of the actors; and the reason for the rule. These may be applied first to the necessary conditions, then the sufficient conditions for resignation. Note that an

²⁸ No previous economic analysis of ministerial responsibility has been discovered by the writer. Advice of the its existence would be appreciated.

²⁹ The implications for this of an assumption of a certain amount of sovereignty by the courts is not examined.

³⁰ Note that in law, a minister's warrant is held at the pleasure of the Crown. A dismissal could occur at any time and a resignation may not be accepted. The legal theory does not accord with convention or reality.

³¹ Jennings *supra* n. 20, 136. *Reference Re Amendment of the Constitution of Canada* 125 D.L.R. (3d) 1, 89.

interesting question is raised by a possible distinction between an offer to resign and an acceptance of that resignation.³² Does the convention govern one or both? The question is not relevant for the purposes of the paper.

Professor Finer talks of the "folklore" that expects a minister to resign whenever anything in his or her department goes wrong. More recently Dr Ovenden has opined that this is indeed the misunderstanding that New Zealanders have of ministerial responsibility; to the extent that "the process of atrophy has more or less killed the convention completely"³³ Academic commentators, officials and Ministers themselves often seem to share this wide view of the convention.³⁴ Viewed as such the concept, of course, seems impractically wide, naive, and unworkable.

It is the contention of this paper that certain necessary conditions must be fulfilled for resignation to occur. First the matter must be of a certain critical magnitude for the issue to be raised at all. A trivial matter will not invoke ministerial responsibility. To some extent the evaluation of magnitude will be influenced by the way in which the second condition is fulfilled. Dishonesty, negligence, incompetence or some other like fault must be present in certain circumstances. The main circumstance is where the minister may be personally at fault. Most resignations on true ministerial responsibility grounds involve personal fault. British cases, for some reason, often seem to involve sex.³⁵ A New Zealand example was the resignation in 1934 of Sir Apirana Ngata. It is possible that the fault may be that of the policy or instructions of the minister or the minister may reasonably be expected to know of and prevent the fault. This situation is rarer and the invocation of collective responsibility often confuses matters.³⁶

These circumstances are not to be rigidly interpreted. Other circumstances may give rise to resignation. However, where the minister did not and could not reasonably

³² There has been a growing tendency for ministers to offer resignation but for the offer not to be accepted. E.g. Mr Nott in the Falklands crisis, the Minister of Finance in 1986, and the Minister of Maori Affairs in 1987, (though as a MP).

³³ Keith Ovenden "Commentary on Sir John Marshall, 'Administration and the Changing Constitution'" in *State Servants and the Public in the 1980s* ed. R.M. Alley, (NZIPA, Wellington, 1980) 94.

³⁴ For example, Finer supra n. 19. S. Encel, in *Cabinet Government in Australia*, (2nd ed.) (Melbourne University Press, Melbourne, 1974) 123 describes the Hon J.M Fraser being derided by other speakers after stating a slightly less strict position.

³⁵ Marshall supra n.19. This does not seem to constitute part of a minister's responsibility to the House. Sex alone (by itself), though, isn't enough - see "Personal Ministerial Responsibility" (1983) Public Law 519. It has often become relevant when a minister has misled Parliament. Also see Geoffrey Marshall "Cabinet Government and the Westland Affair" (1986) Public Law 184, 190 re Leon Brittan's resignation.

³⁶ Lord Carrington's resignation in 1982 seems to constitute an example. E.C.S. Wade & A.W. Bradley, *Constitutional and Administrative Law* (10th ed., Longman, London, 1985) 117.

have been expected to know of or prevent the error, resignation cannot be expected. It is these situations around which much "folklore" exists. The fact is that resignation has not occurred in such circumstances in modern Britain, nor in Australia or New Zealand.³⁷ The persistence of commentators in believing in such a penalty can be substantiated neither in reason, precedent nor authoritative belief. Perhaps it is due to confusion with the first element of ministerial responsibility. The requirement to answer covers all matters for which a minister is responsible. Perhaps it is due to confusion with the sanction of resignation for breach of collective responsibility. Perhaps there is difficulty in comprehending the dynamic element of constitutional conventions combined with reliance on previously misled commentators and "public misunderstanding".

The most unresolved issue surrounding ministerial resignation is whether the convention requires resignation or whether it leaves that simply as a matter for politics. Are the circumstances outlined above sufficient as well as necessary conditions for resignation? Some writers recognise the inherent political element to ministerial responsibility and believe that resignation is always, and should always be, left up to the political process.³⁸ Many writers obviously believe that resignation should occur in the circumstances outlined though most suspect that in practice it can only depend on the politics of the situation: as perceived by the minister, Prime Minister, opposition, colleagues, department, party, media and electors.³⁹ They thus believe that resignation is not prescribed by the convention of ministerial responsibility. Most commentators seem to reach their conclusions with significant help from normative belief.

It is at this point that the convention of ministerial responsibility should be placed in a political context. Reference to economic analysis clarifies that context. As seen above one facet of ministerial responsibility can be characterised as a reporting requirement: the requirement to answer. This reduces agency costs. Presently under examination are the circumstances in which, and if, a particular sanction for ministerial

³⁷ Marshall *supra* n.19., 65. David Butler *supra* n. 27. Note that Dugdale's resignation over Crichton Down, sometimes cited as a counter example of (especially in 1954) was not so: K.J. Scott, "Ministerial Responsibility for Crichton Down" (1955) 17 *New Zealand Journal of Public Administration* 1, 13-20; Hon B.M. Snedden "Ministerial Responsibility in Modern Parliamentary Government" Third Commonwealth and Empire Law Conference, (Law Book Co. Ltd, Sydney, 1965) 3, 8.

But remember that it is difficult to correctly categorise the facts of instances of ministerial resignation or non-resignation. Reasons for resignation are often not what they seem to be, or are stated to be. Marshall *supra* n. 19.

³⁸ E.g. Ovendon *supra* n. 33; Klagsbald *supra* n. 22.

³⁹ E.g. Finer, *supra* n. 19; A.H. Birch "Representative and Responsible Government: An Essay on the British Constitution" (George Allen & Unwin, London, 1964); J.P. Mackintosh *The British Cabinet* (3rd ed., Stevens & Sons Ltd., London, 1977); Wright *supra* n. 27; P. Norton, *The Constitution in Flux* (Martin Robinson, Oxford, 1982); Marshall *supra* n. 19.

misbehaviour exists: resignation. In economic terms the sanction of resignation is merely the cost of certain behaviour. If there are perceived benefits that outweigh the potential cost, the behaviour will still occur. Yet cost accompanies much political behaviour. Good politicians are the most adept at assessing the political costs and benefits of various alternative courses of action. An account of the costs and benefits depends on the political climate at any particular time - it is political analysis. To isolate one such cost is to confer on it an unjustifiedly artificial status. This economic assessment of the role of resignation implies that it should properly be regarded as merely the extreme option of a graduated range of costs associated with a corresponding range of political behaviour.

This explains why the convention of ministerial responsibility in terms of consequences has been so difficult to separate from politics. Political considerations are inherently determinative of whether and in what circumstances resignation is required. Status as a constitutional convention adds force to (raises the cost of ignoring) a norm. Such status is not necessary or, perhaps, desirable in relation to a political cost. The status is justified and desirable in relation to the first facet discussed: the requirement to answer. In this political context only appropriate political costs will encourage an alignment of agent ministers' incentives with principal Parliament's wishes. A constitutional convention is an effective instrument for that purpose.

(c) *Collective Responsibility*

Collective ministerial responsibility is also important though the discussion of it here is brief.⁴⁰ It is a convention which governs Cabinet as a whole. Its substance is that Cabinet ministers are collectively responsible for the actions of the Cabinet. Cabinet decisions must be publicly supported by all Cabinet Ministers. If such support is not forthcoming, resignation is required.⁴¹

In economic terms Cabinet may be seen as the agent of the government caucus and ultimately of the electorate at large. When a group acts as an agent, there tends to be a diffusion of responsibility. Each member is able to blame the group for costly decisions thereby avoiding personal cost. If all ministers can do this the focus of accountability is diluted and lost in confusion. This can occur with Cabinet which may provide a shield to individual ministerial responsibility. In relation to policy, though not personal, matters ministers can claim that faults should be ascribed to Cabinet as a

⁴⁰ Generally, see P.A. Joseph "The Honourable D.F. Quigley's Resignation: Strictly Political - Not Constitutional" (1981) 1 *Canterbury Law Review* 429.

⁴¹ E.g. the resignation of the Hon. D.F. Quigley in June 1982.

whole. The convention of collective responsibility does not remove this ability which is often exercised. It does however ameliorate the effect and incentives. It provides a specific alternative body to take responsibility. No minister may be totally exempted from responsibility. It increases the incentives of each minister to work to achieve cost minimising decisions. Also collective responsibility identifies a focus for responsibility for the overall direction and behaviour of government. In this sense it reduces agency costs to some extent. Note again that the behaviour of Cabinet is affected by the incentives of the political climate at any given time.

4.2 *Responsibility of Shareholders*

The most direct and significant source of ministerial responsibility in respect of SOEs derives from the thresholding minister's special position as shareholders. They are the holders of Treasury stock, since the 1997 General Election, the one minister responsible for SOEs.⁴² The scope of the responsibility is defined broadly by the SOEs Act as an explicit legislative reference to the convention of ministerial responsibility but the practical implications are not necessarily clear. The broad "Principles" stated in these sections are designed to reflect a policy decision in establishing the SOEs to remove ministers from matters of day to day management but to emphasise their responsibility for the broader direction and management performance of SOEs. Section 3 of the Act provides that operational decisions are to be made under the board of directors' authority in accordance with the Statement of Corporate Intent (SCI) and that the board is accountable to the thresholding ministers in accordance with Part III of the Act and the rules of the SOE. Section 6 provides that the thresholding ministers are responsible to the House of Representatives for the performance of the business plan in force by the Act or the rules of the [SOE].⁴³ What are these functions? They are to be determined in terms of management and monitoring. They are defined in the Act and the plan.

4.3 *Shareholders*

There is a clear working relationship between shareholders and directors, especially in small companies. As discussed in Part III.C, the relationship may be that of a family business and private company or a widely held publicly listed company. The shareholders' interests, and in this context therefore the scope of ministerial responsibility, may differ according to the relationship.

⁴² *Ministerial and Parliamentary Business Manual*, Paper Presented to the Institute of Policy Studies, Victoria University of Wellington, 1998, p. 15, 47.

⁴³ *Statement of Principles*, Part III, Sections 3 and 6, SOE Act 1997.

3. Ministerial Responsibility and SOEs

The application of the principles of ministerial responsibility to SOEs is primarily a matter of determining for what a minister is responsible in relation to SOEs.⁴² The way in which a minister is held responsible is through Parliamentary mechanisms which are discussed in Part III.B.

(a) Responsibility as Shareholders

The most direct and significant source of ministerial responsibility in respect of SOEs derives from the shareholding ministers' general function as shareholders. They are the Minister of Finance and, since the 1987 General Election, the one minister responsible for SOEs.⁴³ The scope of the responsibility is indicated broadly by the SOEs Act in an explicit legislative reference to the convention of ministerial responsibility but the practical implications are not immediately clear. The broad "Principles" stated in these sections are designed to reflect a policy decision in establishing the SOEs to remove ministers from matters of day to day management but to accentuate their responsibility for the broader directions and management performance of SOEs. Section 5 of the Act provides that operational decisions are to be made under the board of directors' authority in accordance with the Statement of Corporate Intent (SCI) and that the board is accountable to the shareholding ministers in accordance with Part III of the Act and the rules of the SOE. Section 6 provides that "the shareholding ministers are responsible to the House of Representatives for the performance of the functions given to them by this Act or the rules of the [SOE]". What are these functions? They can be categorised in terms of management and monitoring. They are found in the Act and the articles.

(i) Management

The forms of potential working relationships between shareholders and directors, constitute a broad continuum. As discussed in Part III.C the relationship may be that found in a closely held private company or a widely held publicly listed company. The shareholders' functions, and in this context therefore the scope of ministerial responsibility, may differ according to that relationship.

⁴² Generally (and briefly) see Dr Jonathan Boston, Paper Presented at the Institute of Policy Studies Seminar on 18 June 1987 supra n. 11, 40

⁴³ Presently the Hon. R.O. Douglas and the Hon. R.W. Prebble.

Section 22(3) of the SOEs Act provides broadly that a shareholding minister "may exercise all the rights and powers attaching to the shares in an [SOE] held by that minister". The specific statutory responsibilities relating to the shareholder management of SOEs are detailed in Table 1. They relate to the ownership of SOE shares and equity bonds, and direction as to dividend in Part II of the Act. Otherwise, the Act is consistent with a wide range of shareholder - director relationships varying in closeness. There is little in the Act to prevent shareholding ministers from involvement in management. Whether such changes occur will depend on the effect of political incentives and changes in the overall political climate.

TABLE 1: STATUTORY MANAGEMENT POWERS OF SHAREHOLDERS

Section	Actor	Duty, Power, Function
<i>Part II: Formation and Ownership of New State Enterprises</i>		
s.10	Ministers	may, on behalf of the Crown, acquire shares or equity bonds in the new SOEs (in equal shares) using money appropriated by Parliament for the purpose.
s.11	Ministers	must not dispose of shares or permit shares to be allotted to any other person.
s.13(1),(2)	Ministers	may: (b) determine the dividend; but, in doing so, must: (a) have regard to Part I; and (b) consult the board.

The articles of association offer a more detailed guide to ministers' functions. As analysed more fully in Part III.C, they allocate the power of management between shareholders and directors.⁴⁴ Most power is conferred on the directors. Apart from certain important residuary functions connected with the shares, directors, dividend and sale of the main undertaking,⁴⁵ the articles prevent the shareholding ministers from exercising significant power in company management. They may, by special resolution, change any article.⁴⁶ The cost of changing this relationship is not prohibitive though it is significantly higher than the cost of political intervention in departments. Departmental administration is designed to facilitate political decisionmaking.

⁴⁴ Infra Part III.C (Company Law). Company Law is vital to defining the relationship between shareholders and directors and therefore in defining the scope of ministerial responsibility.

⁴⁵ Ibid, Table 8.

⁴⁶ Section 24 of the Companies Act 1955 and the disclosure requirements of s. 17(1) of the SOEs Act.

(ii) Monitoring

To control the agency costs of the allocation of most management powers to the directors shareholders may monitor directors' activities. The ability to monitor derives mainly from the SOEs Act and also from the Companies Act.⁴⁷ Part III is important. It governs the laying before Parliament of documents for accountability.⁴⁸ In addition, by placing the directors under certain duties, the Act implies that other monitoring functions are assumed by ministers. These functions are detailed in Table 2.

TABLE 2: SHAREHOLDER MONITORING PROVISIONS IN THE SOEs ACT.

<u>Section</u>	<u>Actor</u>	<u>Duty. Power. Function</u>
<u>Express:</u>		
<i>Part III: Accountability</i>		
s.13(1),(2)	Ministers	may: (a) direct a new SOE to include/omit certain provisions in/from its SCI; but, in doing so, must: (a) have regard to Part I; and (b) consult the board.
s.13(3)*	Minister	must lay before Parliament: Notices of direction re SCI, dividend (per 13(1)).
s.17(1)*	Minister	must lay before Parliament the rules and changes to rules of SOEs.
s.17(2)*	Minister	must lay before Parliament the SCI, annual report, audited financial statements, and auditor's report of an SOE.
s.17(3)*	Minister	must lay before Parliament a modification (per 14(4)) of an SCI.
s.17(4)*	Minister	must lay before Parliament the half yearly report of an SOE.
s.22(3)	Minister	may exercise all the rights and powers attaching to SOE shares held by that minister.
<u>Implied:</u>		
<i>Part III: Accountability</i>		
s.14(1)	Ministers	receive a draft SCI within one month of commencement of financial year (comprising certain provisions per 14(2)).
s.14(3)	Ministers	comment on draft SCIs within 2 months of commencement of financial year; and receive completed SCI to ministers within 3 months of commencement of financial year.

⁴⁷ Infra Part III.C (Company Law) for discussion of the disclosure requirements of Company Law.
⁴⁸ For a more detailed account of the powers and duties conferred by the SOEs Act, infra Tables 9 and 10, Part III.D, (Judicial Review).

TABLE 2 CTD: SHAREHOLDER MONITORING PROVISIONS IN THE SOEs ACT

s.14(4)	Ministers	receive a written proposal to modify an SCI by written notice and comment in 1 month.
s.15	Ministers	receive: annual report; audited financial statements; auditors' report; which must: contain such information as is necessary to enable informed assessment of the operations; and state the dividend payable.
s.16	Ministers	receive half yearly reports within 2 months after the end of the first half of the financial year.
s.18	Ministers	may request information relating to affairs of the SOE after consultation with the board (except for information on any identifiable individual).
s.19	Ministers	prescribe the rates of fees for the Audit Office as auditor; and approval the appointment of an additional auditor.

[* Re laying documents before Parliament, see Table 9 infra Part III.D.]

Most of the provisions in Table 2 concern Parliamentary and public monitoring. Section 18 is directed at exclusively shareholder monitoring. Overall, the SOEs Act provides ample scope for any sort of shareholder monitoring regime to be instituted. It is in the process of development at the time of writing.⁴⁹ The monitoring regime is vital to the shareholder-director relationship. It provides for scrutiny of decisionmaking. It determines the level of detail of management and the time in the decisionmaking process at which the ministers will become involved. The expressed intention of the present Government is that it will adhere to the separation of operational management and policy direction mentioned above. The proposed monitoring regime involves a significant level of contact between monitoring unit and SOEs. Of course the regime could be changed for the price of developing a new one - it is not legislated for.

(b) *Other Ministers' Individual Responsibility*

Other ministers may have responsibility for matters which touch more indirectly on SOEs. The most obvious is where the Crown negotiates with an SOE for the undertaking of transparent non-commercial activity under section 7 of the SOEs Act. A minister in charge of that area of activity will be partly responsible for the negotiation with the SOE. Also a minister may be in charge of administering general regulatory law that applies to SOEs - for example the Minister of Trade and Industry and the Commerce Act 1986. Ministerial decisions taken under a specific regulatory regime also involve ministerial responsibility. The 18 separate Acts deriving from the State

⁴⁹ The Treasury, *Commercial Performance of State-Owned Enterprises: Principles for Shareholder Monitoring*. (Wellington, 1987). Infra III.C (Company Law) about the Shareholder monitoring regime.

Enterprises Restructuring Bill are relevant here.⁵⁰ To the extent that officials are involved in the administration of these regimes, ministers are responsible for them.

(c) *Collective Responsibility*

There are few SOE-specific implications of collective responsibility. Cabinet may involve itself in the development and extension of the SOE programme if it wishes. The present Cabinet does so wish. This is evidenced by the post election creation of one of the nine standing cabinet committees as the State Owned Enterprises Committee, to meet every week. Its terms of reference are:⁵¹

- (i) to plan and co-ordinate SOE policies which ensure they operate in the national interest but with the maximum possible commercial independence and competitive neutrality;
- (ii) to review SOE legislation and regulations;
- (iii) to examine public investment in particular SOEs;
- (iv) to review state departments and agencies as candidates to become SOEs;
- (v) to consider employment in SOEs; and
- (vi) to approve appointment to Boards.

4. *Incentives*

As explained, the agency costs of the electorate - minister relationship are controlled by appointing Parliament as a monitor. Ministerial responsibility provides the substantial reporting requirement: ministers must answer to Parliament according to the procedure adopted by Parliament. The sanction for breaking the convention is political cost. The information that may be disclosed by ministerial responsibility may also result in political costs. The potential for disclosure provides an incentive for ministers to take into account the political costs of their actions. Resignation is at the extreme end of the cost spectrum and is often regarded as inherently important to the concept of ministerial responsibility. It is but one, albeit important, cost which underlies ministers' incentives.

⁵⁰ Supra, p. 8 (The Great Experiment).

⁵¹ According to a Cabinet Office statement. The portfolios included in this sector are existing SOEs and: Broadcasting; Government Computing Service; Government Life Insurance Corporation; Government Printing Office; Public Trust Office; Rural Banking and Finance Corporation; and State Insurance Office.

The content of the incentives is beyond the scope of this paper to describe as it is the subject of an entire discipline in itself: political science. The present political climate surrounding SOEs is fractious. The government is politically committed to their success as businesses and the programme to achieve that success involves principles such as competitive neutrality, transparency and removal of ministers of day to day management. The exercise by ministers of their responsibility in relation to SOEs will, in the current political climate, be influenced by these.

The responsibilities that are the subject of the above influences on the shareholding ministers are, as also discussed above, twofold. Certain management functions are reserved for shareholders but most are allocated by the articles to the directors. The SOEs Act enables any sort of shareholder monitoring regime to be instituted in addition to the minimum statutory requirements. Again the political climate influences the choice of shareholder monitoring regime. The current climate and situation militates against close scrutiny of board decisions though the political advantage to be gained from such scrutiny could change rapidly. Shareholding ministers' involvement in both management and monitoring can be changed at little cost and will be changed if the political incentives are strong enough. Perceptions of success of the current regime would raise the costs of change. However, a set of conscious policy decisions at any time, by any Government, would achieve change. This ability exists because the degree of closeness of the shareholder - director relationship derives from the articles and administrative regime rather than being explicitly written into the legislation.

The ministers responsible for areas subject to section 7 transparency agreement are also subject to the influences of ministerial responsibility. The politically high profile the SOE experiment has had ensures that the Cabinet as a whole will continue to be interested in the development and extension of the programme. A serious issue of SOE failure would also involve Cabinet. In these ways collective responsibility influences are also relevant.

From the above it is obvious that the political climate determines the effectiveness of ministerial responsibility. It is perceptions of political cost, as sanctions, that provide the motive force behind the efficacy of the convention in requiring ministerial answerability to Parliament. Political incentives also influence the scope of ministerial responsibility in relation to SOEs through the articles on management and the shape of the monitoring regime.

B. PARLIAMENT⁵²

1. *Parliament and Economics*

A wide reading of the doctrine of Parliamentary Sovereignty would ascribe to Parliament an almost unlimited potential to exercise control over all SOE related activities. Parliamentary procedures adopted from time to time translate that potential into a particular shape. In so doing, the potential is channelled, bridled; in the short term. Constitutional conventions influence practice and other, less definable, traditions contribute to the ambience. All is set in the context of political interest and incentives.

Parliament may have direct influence over ministers, officials and SOEs themselves. As seen in Part III.A, Parliament is integrally connected with the exercise of ministerial responsibility. It is the body to which ministers are responsible and its procedures determine how a minister is to answer. This relationship provides a clue as to the wider role of Parliament which can be seen in economic terms. For the purposes of the paper Parliament consists of the democratically elected representatives of the electorate. When an election is held two simultaneous decisions are being made. The electorate is choosing a party to govern as its agents. This obviously economises on the transaction costs inherent in a perfect democracy. Simultaneously it is choosing an opposition party⁵³ to monitor and scrutinise those agents - reducing agency costs. Parliament is the formal forum where that monitoring and scrutiny takes place. The mechanisms of Parliamentary scrutiny are the mechanisms by which the behaviour of the electorate's agents is influenced and misbehaviour deterred.

There are four mechanisms of Parliamentary scrutiny that are particularly significant to SOEs: questions; debates; select committees; and information disclosure. The above analysis is relevant to all. The rest of this part analyses, for each mechanism in turn, the mechanics that relate to SOEs and the influence it has on the incentives and behaviour of the actors involved.

⁵² See very generally Peter Wilenski *Public Power and Public Administration* (Hale & Iremonger and the RAIPA, Sydney, 1986). More particularly: Keith Jackson, *The Dilemma of Parliament* (Allen & Unwin with Port Nicholson Press, Wellington 1987), though a conventional approach is taken.

⁵³ The division is not as clear cut as this. Monitoring and scrutiny of decisions occurs within the governing party as well.

2. Questions

Questions asked by members of Parliament and answered by ministers of the Crown constitute an obvious form of Parliamentary scrutiny and an important element of effecting ministerial responsibility. Questions can be, and have been used as, a direct way to hold the shareholders of SOEs to account over a specific matter and/or elicit information about SOEs. They can be used as potent weapons in the political process though their use is curtailed by certain limitations.

(a) Mechanics

There are now four forms of questions: Questions of the Day; questions for oral answer; questions for written answer; and urgent questions. Questions of the Day, introduced in 1985, are asked and answered (before other questions) on the same day.⁵⁴ They provide a means of pursuing highly topical lines of inquiry. Other questions for oral answer are answered orally in the House on two days notice.⁵⁵ In addition, supplementary questions may be asked by any member to "elucidate or clarify a matter raised in a question or in an answer".⁵⁶ Political campaigns on specific issues may be usefully pursued by either side using the mechanism of oral questions. Questions for written answer (answered within three sitting days of notice)⁵⁷ are used primarily as information (or commitment) gathering mechanisms. Urgent Questions may be asked without notice on the ground of urgency in the public interest (which is assessed by the Speaker).⁵⁸ All questions are printed in Hansard.⁵⁹

The effectiveness of questions as a tool of scrutiny is limited in three main ways: the time available for answering; the subject matter; and the necessity to answer.

(i) Time

Each sitting day the first six Questions of the Day are asked and answered (with supplementaries) first, for up to 15 minutes.⁶⁰ Questions for oral answer by ministers are next, followed by urgent questions and then questions for oral answer by other members.⁶¹ Questions to ministers may not be asked after 45 minutes have been spent on oral questions and any remaining questions are answered in writing by 5.30 p.m.

⁵⁴ Standing Order 80(1). All Standing Orders quoted are from Standing Orders of the House of Representatives, New Zealand, as at 20 November 1986.

⁵⁵ Standing Order 78.

⁵⁶ Standing Order 85.

⁵⁷ Standing Orders 79 and 88.

⁵⁸ Standing Order 87.

⁵⁹ Oral questions inherently, and written questions by virtue of S.O. 88(1).

⁶⁰ Standing Order 80(3),(4).

⁶¹ Standing Order 75(3).

that day.⁶² Dealing with remaining questions in this way is a common practice, but depends on the number of questions, particularly supplementary questions, and Points of Order, that are asked or made.

(ii) Subject Matter

Standing Order 74 requires that questions to ministers must "[relate] to public affairs with which the Minister is officially connected, or to proceedings in the House or any matter of administration for which the Minister is responsible." Implications of this for SOEs depend on the scope of responsibility as discussed in Part III.A. Day to day SOE management matters are not the responsibility of the shareholding ministers. They may legitimately refuse to answer questions on those matters. The degree to which a minister is prepared to acknowledge responsibility over certain matters will help determine the effective scope of responsibility. The practice in relation to questions about the management of SOEs is not yet clear but it is developing rapidly.⁶³

Sometimes ministers invoke a justification for not answering.⁶⁴ Various formulae have been used: the information will be available in the annual report which is not yet ready for publication;⁶⁵ "I am told by the corporation that the information is commercially sensitive and cannot be released";⁶⁶ "the information sought is of a commercial nature and confidential to the corporation. I suggest the member approach the corporation direct.";⁶⁷ "I have been told by the corporation that as . . . the question is irrelevant."⁶⁸ Sometimes ministers pass on advice from the SOE that answers the question e.g. "I am advised by the corporation"⁶⁹ or "the corporation has told me".⁷⁰ Sometimes ministers answer the question directly, but usually in answer to a supplementary oral question or where the minister is directly responsible for a matter that impinges on SOEs.

⁶² Standing Orders 81(2) and 86

⁶³ "SOEs' Accountability to Parliament" (1987) 10 T.C.L. 16 (431).

⁶⁴ Examples of questions are taken from all the kinds of question from the last three weeks of the Parliamentary term before the 1987 General Election.

⁶⁵ N. Z. Parliamentary Debates, Vol.482, 1987; 10,217.

⁶⁶ N. Z. Parliamentary Debates, Vol.482, 1987; 10,385.

⁶⁷ N. Z. Parliamentary Debates, Vol.482, 1987; 10,380.

⁶⁸ N. Z. Parliamentary Debates, Vol.482, 1987; 10,368.

⁶⁹ E.g. N. Z. Parliamentary Debates, Vol.482, 1987; 10,210.

⁷⁰ N. Z. Parliamentary Debates, Vol.482, 1987; 10,131.

The Deputy Prime Minister, in himself answering a written question, has stated:⁷¹

"Responsibility for the day to day operations of each corporation, however, will lie with management. Ministers will therefore consult the corporation concerned before providing answers to questions concerning its commercial activities. The decision whether to disclose information relating to its commercial approach is one for each corporation to make according to its own circumstances."

The practice so far shows an large number of questions asked about SOEs, many of them written question eliciting information, often as part of a series on the same issue.⁷² The range of issues canvassed is very wide. Most encouraging of all, most questions are answered unless the excuse sounds reasonable. It seems here that the political cost of not answering questions even with a reasonable justification is too high. The number of (subjectively) unreasonable excuses is relatively low, though they certainly exist. A reading of Parliamentary questions can shed significant light on the operation of SOEs and, indeed, was helpful in the writing of this paper.

(iii) Necessity to Answer

Interrelated with the issue of which questions may be asked is the sanction for not answering. There is no formal requirement that any question be answered, though there are few blatant refusals to answer. This suggests that there is a perceived political cost to not answering questions. A reasonable excuse must lessen this cost. The scope of ministerial responsibility for SOEs discussed above (as defined by the minister) may be used as such a justification though that doesn't appear to be the case. Also, the increased emphasis on profitability of SOEs in a competitive arena increases the justification of refusing to answer on the ground of commercial sensitivity.

(b) *Incentives*

Examining the incentives provided by the mechanism of questions in their practical context emphasises potential results. Such an *ex ante* view leads to a greater appreciation of the value of questions than might otherwise exist.

The opposition and the government face political incentives to project advantageous images of themselves and disadvantageous images of each other. Parliamentary question time provides a public forum in which the opposition can mount

⁷¹ N. Z. Parliamentary Debates, Vol.482, 1987; 10,634.

⁷² See particularly the written questions of the Hon. G.F. Gair.

concerted campaigns aimed at undermining ministers' credibility on issues of the moment. Such campaigns can be effective - the February 1987 offer of resignation by the Hon. Koro Wetere is an example. Ministers are effectively forced to answer (given a perception of high political costs of refusing) on a subject picked by political opponents. Also, of course, the government has an incentive to ask questions aimed at bolstering their minister's image.

The incentives that all this provides are significant. A shareholding minister will be aware that an action taken with respect to an SOE could become the subject of public scrutiny by questions which the media could pick up. A political cost could occur if the minister is revealed to have acted improperly or unwisely. Such actions will therefore be avoided to the extent that: (a) the minister thinks about the consequences; (b) revelation is judged to be likely; and (c) the cost is perceived to be too great. A political benefit could accrue to the minister if good news is revealed, though there are other media available for such a message.

Is revelation likely? There are incentives on ministers to avoid revelation. The time limits to question time are not significant except to the extent that Parliament does not sit. The perceived political cost to ministers of refusing to answer without a reasonable (sounding) excuse is relevant. So are the options of a minister in choosing the form of answer given. Again, the extent of these limitations will be determined by the interplay of political incentives. Perceptions of short term political problems of answering awkward questions will be balanced against potential opposition charges of non-accountability in specific and general contexts. It appears that in practice the outcome is a balanced one and that the incentives to conceal are not dominant. It is also evident that many questions are aimed at eliciting information that may be relevant in future political battles. Finally, it should be realised that unpredictability is a hallmark of issues that arise in Parliament. A minister cannot rely on any subject not being aired.

Parliamentary questions, then, do not constitute a calm, coherent, constructive method of exploring SOE issues with a view to improvement. They do provide an incentive for shareholding ministers to act wisely and properly in relation to matters for which they are responsible. This is their main value. The incentives provided are, of course, always dependent on perceptions of political cost and benefit. The political climate underpins the efficacy of all mechanisms of Parliamentary scrutiny.

3. *Debates*

(a) *Mechanics*

(i) Bills

Debates on bills occur on: introduction; report back from a select committee; the second reading; Committee stages; and the third reading. Introductory debate usually involves identification of issues by each side of the House and is limited to two hours. It is the second reading that provides the most comprehensive debate. Speeches are 20 minutes each.⁷³ Debate tends to be wide ranging and especially concerns policy. After the second reading a bill is committed to a Committee of the Whole House for more detailed consideration clause by clause and most amendments in the Chamber occur here. Unlike other proceedings of the House, committee debates are not reported in Hansard. The purpose of the third reading debate is usually to record amendments made in Committee and restate each side's arguments for or against the bill.

Occasionally, a Government Bill will refer to SOEs directly or indirectly. An example was the recent State Enterprises Restructuring Bill.⁷⁴ The passage of such a Bill renews, to varying degrees, the opportunity for Parliament to consider the role, status and functioning of SOEs. Of course, for there to be scope to examine the functioning of SOEs a bill must directly impinge on SOEs.

The Budgetary Process offers some help in holding SOEs to account; but not much. The Imprest Supply Bill may be passed in one day. The annual Appropriation Bill, along with the Estimates of expenditure, may impinge on SOE as debate is very wide ranging. Pressure of time and wide potential subject matter constrain and diffuse the effect. The Estimates debate lasts for thirteen days and scrutiny could be devoted to any vote as the opposition has the initiative in use of time. The competition between political issues for attention crowds out many potentially useful topics. Also, as limited liability companies, only certain estimates will be relevant to SOEs: Vote, Capital Participation for loan and equity capital injections; the estimates of any monitoring department; and the estimates of any body that has negotiated a section 7 transparent social service with an SOE. In addition, the timing of the whole process raises major questions. The financial year begins on 1 April. The Budget is not usually introduced for that year until June or July. The money that Parliament is supposedly deciding whether or not to spend has often already been spent.

⁷³ Standing Orders 212 - 214.

⁷⁴ Supra p 8.

Private Members' Bills are another vehicle for Parliamentary scrutiny of SOEs. Indeed, an Opposition member introduced a State-Owned Enterprises Amendment Bill in 1987 in order to debate issues of concern regarding SOEs.⁷⁵ The fate of Private Members' Bills which are opposed by the Government is usually a quick death - they do not get introduced. However the introductory debate lasts for up to two hours, with mainly 10 minute speeches⁷⁶ and does provide some opportunity for points to be made about a particular subject. Sometimes it will be politically difficult for the Government to oppose a bill and its fate may be a more lingering death in a select committee. Of course the opportunity to introduce a Private Members' Bill is also the subject of competition between all potential issues. As always, there must be a perceived political return from debate on SOEs (to at least one member) for this method of scrutiny to be relevant.

(ii) Miscellaneous Debates

There are four miscellaneous debates that take place in Parliament in which SOEs could be mentioned. The Address in Reply debate is wide ranging in scope, replying to the Speech from the Throne which opens Parliament.⁷⁷

Once each sitting day, it is possible for a "debate on a definite matter of urgent public importance" to occur for two hours. The Speaker must be of the opinion that the matter concerns "a particular case of recent occurrence which requires the immediate attention of the House and the Government and which involves the administrative or ministerial responsibility of the Government".⁷⁸ Arguments could here be canvassed over a particular issue that flares up in relation to SOEs.

Finally, on each Wednesday, a general debate is held for two hours. During the debate members may refer to "any private members' notices of motion, any select committee reports . . . presented during the session and any Government responses to such reports, and any ministerial replies to questions given or ministerial statements made within the previous week."⁷⁹ In a more general way than the urgent debate, this provides a useful opportunity to air matters of importance, but again is limited by the competition between subjects to be considered.

⁷⁵ N.Z. Parliamentary Debates, Vol. 479, 1987; p.8233.

⁷⁶ Standing Order 203.

⁷⁷ This was traditionally an expression of loyalty to the Crown: David McGee, *Parliamentary Practice in New Zealand*, (Government Printer, Wellington, 1985).

⁷⁸ Standing Order 89

⁷⁹ Standing Order 92.

(b) *Incentives*

There are major limitations on the impact of debates which have frequently been lamented by commentators.⁸⁰ With a perpetually tight Parliamentary timetable, many topics are available for debate. Coherent analysis and policy recommendations are lacking. Occasionally an eloquent, reasoned speech can have an effect.⁸¹ Generally, however, the House is a forum for two sides to put pre-determined arguments past each other to the general public. Policy stances are decided in caucuses within each party and few positive initiatives seem to come from the Chamber. The often highly charged atmosphere of the Chamber does not lend itself to constructive debate. Political incentives concern each side with strategies of attack and defence, embarrassment and victory.

With such observations critics rest their charge of undue and deleterious politicisation of a scrutiny process. Yet from an *ex ante* perspective, useful incentives can be identified in the above account. The utility lies again not in the constructive effect of debate but in the deterrent effect. Parliamentary debate is a mechanism by which political cost, to the Government generally or a minister specifically, can be amplified. The government faces an incentive to formulate systems and structures which minimise the potential for errors and therefore embarrassment. With an issue at hand, a shareholding minister's performance may be criticised in the House, specifically or generally. A sustained attack in Parliamentary debates can generate significant political heat - cost - if mounted with good grounds. Ministers face incentives to avoid actions or omissions that could attract such damaging criticism. And MPs of the governing party face incentives to aid that avoidance. Again, these incentives are mitigated by the actors' perceptions of the likelihood of discovery and of sustained attack. It could be expected that larger policy issues are more likely to attract attention than lesser administrative decisions. This provides a justification for a key element of the SOE accountability structure: viz., the accentuation of ministerial responsibility for, and thus Parliamentary scrutiny of, policy decisions rather than operational decisions.

⁸⁰ E.g. Sandra J. Davies, "Parliamentary Accountability of Government-Owned Corporations and Companies" (1986) 9 Public Sector 3.

⁸¹ Palmer, *supra* n.2, 137.

4. *Select Committees*

MPs often feel that working on select committees is one of their most important functions. Parliament's select committee system was reformed in 1985 with changes to Standing Orders. They now possess significant powers to initiate and follow through inquiries in addition to their conventional role of hearing submissions on bills before the House. While the powers are an improvement, it is not apparent that select committees are yet an optimal accountability mechanism.

(a) *Mechanics*

The new select committees are comprised generally of five members with a Government majority of 3-2. Ministers do not now sit on committees concerned with their portfolios. With one exception committees have a Government chairperson though there is scope for more.⁸² Each side will usually still be guided by the party line, though much less so than in the House. Often a committee can develop a genuinely bi-partisan atmosphere, though this always depends on the issues under discussion. Personalities will, of course, also be relevant. Most committees are based around ministerial portfolios though others may be set up as need arises.⁸³ Proceedings are public unless otherwise decided. Table 3 on page 32 sets out the select committees.

A major role of select committees is to consider legislation introduced to the House. Procedure in this regard is well developed in the hearing of submissions. Major changes in the policy of a government bill are still usually with notice to and consent from the relevant minister are still rare. But changes can be and are made to bills in select committees, by the committee members alone. Select committees offer an opportunity for more considered reflection on SOEs.

The new investigatory powers of select committees are potentially more relevant to SOEs. Their introduction follows the perceived success of use made of similar powers by the Public Expenditure Committee. Select committees have the power to:⁸⁴

- (a) send for persons, papers and records;
- (b) request any person to attend and give evidence;
- (c) summon any person as a witness to attend and give evidence, and produce papers and records in that person's possession, custody or control; and
- (d) on the direction of the House, examine witnesses on oath.

⁸² Standing Order 318. The one exception was D.L. Kidd who chaired the Regulations Review Committee during the last Parliamentary session.

⁸³ Standing Order 317.

⁸⁴ Standing Orders 326, 358 and 360.

Sanctions exist for failure to comply. The ultimate sanction is being held in contempt of Parliament before the Privileges Committee.

The terms of reference for each portfolio committee generally includes:⁸⁵ "to examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to . . .". This phrase covers SOEs.⁸⁶ It seems, though, that no standing allocation of SOEs to particular committees has been arranged. If an investigation were to be initiated it is likely that a new SOE would be allocated to the committee which has responsibility for the department from which the SOE was created. Table 3 presents a likely allocation.

TABLE 3: SELECT COMMITTEES AND SOEs ⁸⁷

<u>Select Committee</u>	<u>SOE</u>
<i>Based on portfolio:</i>	
Commerce and Marketing	Tourist Hotel Corporation of N.Z.
Communications and Road Safety	Air New Zealand Ltd. Airways Corporation of N.Z. N.Z. Post Ltd. N.Z. Railways Corporation The Shipping Corporation of N.Z. Telecom Corporation of N.Z.
Education and Science	
Finance and Expenditure	Post Office Bank Ltd.
Foreign Affairs and Defence	
Government Administration	Government Property Services Ltd.
Internal Affairs and Local Government	
Justice and Law Reform	
Labour	
Maori Affairs	
Planning and Development	Electricity Corporation of N.Z. Ltd.
Primary Production	Coal Corporation of N.Z. Ltd. N.Z. Forestry Corporation Ltd. Land Corporation Ltd.
Social Services.	

⁸⁵ Standing Order 322. The reference to policy is a significant development.

⁸⁶ It is intended to cover, and is interpreted by select committee officers to cover, SOEs.

⁸⁷ Standing Orders 322, 317.

TABLE 3 CTD: SELECT COMMITTEES AND SOEs

<i>Others</i>	Allocation of SOE to committee?
Business	
Electoral Law	
Privileges	
Regulations Review	
Standing Orders	

Also, the Finance and Expenditure Committee has "responsibility for the overall review of financial management in all government departments and other public bodies". The Government Administration Committee has "responsibility for the overall review of administration and management in government departments and other government bodies". Nomenclature is anything but consistent but there is little doubt on the part of those involved that these responsibilities include the relevant aspects of all SOEs.⁸⁸ In any case a challenge is difficult to mount to select committee jurisdiction⁸⁹ and even if it were successful jurisdiction could easily be granted by the House anyway if political incentives so dictated.

The scope for investigation is wide. A committee may attend to detail or be concerned with broad principle. Almost every aspect of SOEs could be investigated: in relation to the minister; the SOE directors; or management directly. In a report to the House, anything could be recommended in detail or in principle. A one hour debate may occur on a motion to table a report on a bill. A new standing order now provides that within 90 days of a report other than this being tabled "the Government shall present a paper to the House responding to any recommendations contained in the report which are addressed to it."⁹⁰

A number of reports have been delivered under the new terms of reference. Committees seem still to be in the process of flexing their muscles but have already indicated a willingness to scrutinise SOEs to some extent. The Regulations Review Committee is keeping a watching brief over SOEs and was responsible for section 32(4) of the SOEs Act.

⁸⁸ The most recent detailed consideration of select committees' terms of reference is found in: *Public Expenditure Committee: Report on Inquiry into Devaluation*, New Zealand Parliament. House of Representative. Appendix to the Journals, Vol 12, I.12C.

⁸⁹ Ibid. The Speaker says, in relation to more constrained terms of reference: "I would not wish to see such sweeping challenges to a select committee's jurisdiction being made again."

⁹⁰ Standing Order 352.

Deficiencies still seem to exist in the functioning of the new committees. Pressure of other work weighs heavily on MPs' time and often prevents regular attendance. Membership of committees turns over frequently, in response to other pressures. Pressure of work in each committee, with bills passing endlessly through the House, crowds out detailed investigation of other longer term issues. Resources in the form of servicing research officers have been increased but there is still a major resource gap between an organisation being investigated and the investigating committee. It should be noted though that a select committee could expect substantial assistance from the Auditor-General and staff of the Audit Office. But an SOE has many permanent staff working on its concerns fulltime. A select committee has few staff working part time on one of a great variety of issues. Knowledge, time, skills, and experience are on the side of an SOE.

(b) *Incentives*

The Standing Orders Committee's first objective in restructuring the select committees was "to provide Parliament with the means of scrutinising the activities of the Government and its departments on a continuing and systematic basis, for the purpose of increased accountability."⁹¹ Indeed the select committee could potentially exercise more coherent and comprehensive scrutiny over SOEs than could be achieved by any other method. In practice, particular matters of SOE administration may be investigated and/or commented on. An issue may be identified, pursued, analysed and recommendations made. The physical constraints on use of select committees are significant and reduce effectiveness.

Lack of time and resources and the membership problems prevent fulfillment of select committee potential. The apparently high opportunity cost of MPs' time indicates that a solution may be found in increasing numbers of MPs as well as resources. And while the usual political incentives still operate, the implications of a government majority on a committee may stymie their effect in inducing investigations. Members of the governing party may have an interest in checking maladministration. In a select committee, unlike in the Chamber, that work may be successfully undertaken. However there is also a strong incentive not to allow attacks that will reflect on the Government's credibility. Also unlike in the Chamber those incentives may prevent even the exposure of the issues in the committee. This reflects the difference in the role of the debating chamber and select committee.

⁹¹ *Standing Orders Committee: First Report July 1985* Parliament. House of Representatives. Appendix to the Journals, vol. 12, I.14: 31.

5. *Disclosure of Information*

(a) *Mechanics*

According to the Controller and Auditor-General, the essence of accountability is information.⁹² The perspective of accountability taken by this paper is most concerned with incentives, influences on behaviour. Yet the provision of adequate information is a necessary condition of this accountability too. The possession or lack of information has determinative effects on the behaviour of actors in the SOE process. Information costs lie at the very heart of the agency problem which is encountered so frequently in the SOE context. There are several sources of authority requiring disclosure of SOE related information.⁹³ Parliamentary disclosure may be significant.

(i) Methods of Disclosure

Information may become publicly available through being unearthed by the methods described earlier: through Questions; Parliamentary debates; and select committees; also by notices of motion and like devices. In addition there is a "purer" form of provision of information: for example, the presenting or tabling of papers in the House. Given the leave of the House any member may table a document.⁹⁴ A Minister may present a "paper" to the House. In debate, if a Minister quotes from "a document relating to public affairs" any member may require it to be laid upon the Table of the House, unless it is stated to be of a confidential nature. A Minister may also provide information directly to the House by way of Ministerial statement in relation to "some matter of significant public importance which requires to be brought to the House's attention immediately".⁹⁵ Certain restrictions exist on Ministerial Statements in relation to time, subject matter and right of reply by the Opposition. Another means of information being disclosed to Parliament is by order of the House itself.⁹⁶ This procedure is little used.

⁹² *Auditor-General's Report 1984* Parliament. House of Representatives. Appendices to the Journal, B.1 [Part III] p.28.

⁹³ E.g. from Company Law infra III.C (Company Law), shareholder monitoring supra p.19-20. (Ministerial Responsibility), and from the Official Information Act, infra III.E (Other Elements).

⁹⁴ "With regard to the tabling of documents by private members . . . the rule or practice has been that the tabling is by leave of the House. If there is objection the document cannot be tabled." *Speakers' Rulings: 1867 to 1980 inclusive* New Zealand. House of Representatives. 104/7. (N.Z. Parliamentary Debates Vol. 417, 1978; 811 (Harrison)).

⁹⁵ Standing Orders 94, 160 and 170 respectively.

⁹⁶ A specific procedure for ordering papers (by a "motion for a return") was removed from Standing Orders in 1985 on grounds of little practical significance, but the same effect may now be achieved by ordinary motion. See *Standing Orders Committee: First Report July 1985* supra n.91, para 3.6.4.1.

Finally, an Act may provide that certain documents must be tabled in Parliament. The provisions of the SOE Act 1986 that do this have been identified by the Government, and observers such as the Auditor-General, as a major component of the accountability structure of SOEs - especially the Statement of Corporate Intent (SCI).⁹⁷ Under the SOEs Act the documents presented in Table 4 must be laid before Parliament. In each instance in Table 4, it is the responsible Minister who has the duty of laying the documents before Parliament. If this does not take place the primary sanction would be political, as with many of Parliament's rules, though an application for judicial review could also be made.⁹⁸

TABLE 4: DOCUMENTS THAT MUST BE LAID BEFORE PARLIAMENT

<u>Section</u>	<u>Document</u>	<u>When required</u>
13(3) [13(1)]	All notices of direction to boards of new SOEs by the shareholding Ministers regarding: (a) including or omitting matters from a statement of corporate intent; or (b) determining the amount of dividend payable.	12 sitting days after notice given to the board.
17(1)	The rules and changes to the rules of each SOE.	12 sitting days after the date of the rules.
17(2) [14,15]	(a) The statement of corporate intent of each SOE for that year and the succeeding 2 years; (b) the annual report and audited financial statements for each SOE for the preceeding year; (c) the auditor's report on those financial statements.	12 sitting days after the Minister receives all the documents.
17(3) [14(4)]	All notices to shareholding Ministers from boards of SOEs, modifying an SCI. receives the notice.	12 sitting days after the Minister
17(4) [16]	The half-yearly reports of SOEs. being given to the Minister.	12 sitting days after
23(2) [23(1)]	Contracts or other documents between the shareholding ministers and SOEs regarding: (a) the transfer of Crown assets and liabilities to the SOE; (b) the authorisation of SOEs to act on behalf of the Crown in providing goods or services or managing assets or liabilities; (c) the granting of leases etc to SOEs in relation to Crown assets or liabilities.	12 sitting days after the date of the document.

⁹⁷ Palmer, *supra* n.2, 87.

⁹⁸ *Infra* Part III.D (Judicial Review).

TABLE 4 CTD: DOCUMENTS THAT MUST BE LAID BEFORE PARLIAMENT

N.B:

- S.13 A notice may be given anytime.
- S.14 The SCI must be delivered to the shareholding Ministers within 3 months of the commencement of the financial year.
- S.15 Annual report, financial statement, and auditor's report must be delivered to the shareholding ministers within 3 months after the end of each financial year.
- S.16 half-yearly reports must be delivered to the shareholding ministers within 2 months after the end of the first half of each financial year.

(ii) Content of Information

The documents detailed in Table 4 are to be disclosed. The substantive documents are: the SCI; the annual report; accounts; auditor's report; half-yearly reports. Almost any information could be disclosed in these documents. What information will be disclosed? There are some statutory requirements as to content and there are powers to require certain information to be in the documents. As already seen, the shareholder monitoring regime may be set up on the basis of these sections. They are presented in Table 5. There is also a broad discretionary restriction on disclosure. According to section 20 nothing in the SOEs Act requires inclusion in any of these documents of information that could be withheld under the Official Information Act 1982.⁹⁹

TABLE 5: REQUIRED AND DISCRETIONARY DISCLOSURE UNDER THE SOEs ACT

<u>Section</u>	<u>Information Required to be Disclosed</u>
<i>Statement of Corporate Intent - section 14</i>	
(2)	Specify for the Group (SOE & subsidiaries) for the current and next 2 financial years:
(a)	Objectives
(b)	Nature and scope of activities.
(c)	Ratio of consolidated shareholders' funds to total assets, and definitions.

TABLE 5: REQUIRED & DISCRETIONARY DISCLOSURE UNDER THE SOEs ACT

(d)	Accounting Policies
(e)	Performance Targets
(f)	Estimate of intended distribution of profits and reserves to the Crown.
(g)	What information is to be provided to the Shareholding ministers.
(h)	Procedures for an SOE acquiring any company or other organisation
(i)	Activities for which the board seeks compensation.

⁹⁹ Supra Part III.E (Other Elements).

- (j) Board's estimate of commercial value of Crown's investment and manner of reassessment.
- (k) Such other matters as are agreed by the Shareholding Ministers and the board.
- (4) The SCI may be modified by the board using the same procedure as for the SCI proper.
- 13(1)(a) The shareholding ministers may direct inclusion in or omission from the SCI of any provision of a kind referred to in s.14(2)(a) to (h).

Annual Report - section 15

- (1)(a) A report of the operations of the SOE and subsidiaries.
- (2)(a) Such information as is necessary to enable an informed assessment of the operations of the SOE and subsidiaries, including a comparison of the performance of the SOEs and subsidiaries with the SCI.
- (2)(b) The dividend payable to the Crown for that year.

Accounts - section 15

- (1)(b) Audited consolidated financial statements for the financial year consisting of:
- statements of
 - financial position
 - profit and loss
 - changes in financial position
 - such other statements as may be necessary to show
 - the financial position of the SOE and subsidiaries
 - the financial results of their operations.

Half-Yearly Report - section 16

- (2) Such information as required by the SCI.

Other Information - section 18

- (1) Such information relating to the affairs of the SOE (or subsidiary) as the shareholding ministers requests after consultation with the board.
- individual (except, under subs.(2) information about, and enabling the identification of, employees and customers.

Due to the short period of commercial operation of the SOEs and problems with asset transfers, it is difficult to assess the form and level of detail that information actually disclosed under these sections will take. Importantly too, the sections allow much information to be disclosed, but the level of detail necessary to satisfy the broad statutory requirements is subject to interpretation. Shareholding ministers have a broad power to require disclosure, to themselves under section 18 and to Parliament under section 13(1)(a). The sections make some attempt to specify the content of the documents but even these may be interpreted to require many degrees of specificity. A broad standard of the effect of the information that must be attained is present only in relation to the annual report. The degree to which it is invoked remains to be seen. The content of information disclosed generally appears to depend on the incentives of the actors as analysed below.

Statements of Corporate Intent:

The Statements of Corporate Intent are available, though access is dependent on Parliamentary photocopying or the goodwill of an SOE. To help gauge the likely

information outcome of the process of disclosure, a brief analysis of the SCIs that have been presented to Parliament is undertaken here. The SCIs for the nine new SOEs vary in length from 3 to 7 pages plus annexes. They are structured according to the paragraphs of section 14. All are specific to that SOE. For many, elements of the required information are absent due to the incomplete status of assets valuations and other establishment actions.

The statements of SOE objectives expand on the section 4 objective of running a successful business and place that in the context of the enterprise-specific activities. Two SOEs provide extremely brief and general statements¹⁰⁰ but the others give a reasonable indication of the priorities and directions of management. At least three detail both general purposes and objectives and supplementary and specific objectives, or strategies, in relation to more detailed areas of operation.¹⁰¹ The specifications of nature and scope of activities are also broad but most¹⁰² detail significant specific areas of current activity and the proposed future moves in them.

No SCI details the capital structure of the company or the value of the Crown's investment due to incomplete asset valuation negotiations, though some indicate the types of capital or projected ratio.¹⁰³ These will be the subject of modified SCIs. The accounting policies are presented in varying amounts of detail - all but one SOE presented in an annex.¹⁰⁴ Most refer to "generally accepted methods of accounting" and the New Zealand Society of Accountants' standards - in so far as they are applicable. Historical cost accounting and an accruals basis is adopted, with provision for asset revaluation periodically. Depreciation rates of certain items are set out in some statements. The balance dates, where provided, differ: either 31 March or 30 June.¹⁰⁵

Performance targets are mainly unspecified as yet, though some types of indicators are specified, such as: after tax and other types of "profit" on shareholders' funds; ratios of profit to other corporate indicators; output; accident rates. Telecom also pays attention to some non-financial indicators such as time taken to provide services; time taken to rectify faults; and service answering times. Dividend policy is specified, on an interim basis, in terms of procedure for determination, timing and broad goals.

¹⁰⁰ Post Office Bank Ltd. and New Zealand Post Ltd.

¹⁰¹ Airways Corporation of New Zealand Ltd., about: pricing; safety; modernisation; industry study; and information to shareholders. Telecom Corporation of New Zealand Ltd., about: profit; pricing; financial management; investment; operations. Also, Coal Corporation.

¹⁰² Electricorp's statement is two sentences.

¹⁰³ Post Office Bank Ltd. deliberately refers to gearing rather than the proprietorship ratio.

¹⁰⁴ Post Office Bank Ltd. has not formulated policies.

¹⁰⁵ 31 March: Forest Corp; Electricorp; 30 June: Landcorp

Generally, "an appropriate level of earnings for profitable investment" is to be retained. Post Office Bank Ltd. anticipates no dividends in the next three years. Coal Corporation and New Zealand Post Ltd. flag the rate of 40% on after-tax earnings.

The procedures for SOEs taking over other companies have obviously been co-ordinated between the SOEs. With the exception of Electricorp¹⁰⁶ prior written notice will be given to the shareholders of an intention to acquire more than 20% of a company's issued capital.¹⁰⁷ Compensation for the cost of various activities is sought from the Crown according to Table 6 below.

The information flows to be provided by SOEs vary significantly. Most use the other SOE Act disclosure requirements as a basis. Some move little further beyond this.¹⁰⁸ Others anticipate section 18 requests. Some refer to private sector practice with a major shareholder as the relevant standard. Otherwise there is variation in the types and detail of information specified.

Similarly the overall impression of the content of the SCIs is that there is much discretion as to what to disclose. Degree of disclosure varies from SOE to SOE. Most have more than required in some areas and the bare minimum in others. The information required gives some idea of the general character and directions of an SOE and of aspects of its operations. Detail need not be and often are not disclosed. The SCI gives the flavour of an SOE, not the recipe.

TABLE 6: REQUESTS FOR COMPENSATION FOR NON-COMMERCIAL ACTIVITIES DISCLOSED BY SCIs

<u>SOE</u>	<u>Activity</u>
New Zealand Post Ltd.	Keeping open surplus Post Offices Universal letter delivery, if current legal protection is lifted. Rural mail deliveries Registered Publications Literature for the Blind
Post Office Bank Ltd.	Keeping open 600 Post Offices surplus to business requirements
Telecom	Telegraph services The 111 Emergency service

¹⁰⁶ Which specifies a similar requirement in relation to disposal of such shares.

¹⁰⁷ 10% for New Zealand Forestry Corporation.

¹⁰⁸ New Zealand Post Ltd., New Zealand Forestry Corporation Ltd.

TABLE 6: REQUESTS FOR COMPENSATION FOR NON-COMMERCIAL ACTIVITIES DISCLOSED BY SOEs

Landcorp	South Island pastoral leases management Molesworth Station management planning
Airways Corporation.	Search and rescue Civil Defence

(iii) Disclosure to Whom?

An effect of information being before Parliament is that it is publicly available. For effective public availability however, it must also be printed and available for purchase. Printing of papers presented to the house by a Minister or the Speaker may be ordered, either by the Clerk at the time for presentation of papers, or on the motion of a Minister.¹⁰⁹ Information imparted to the House during debate will be broadcast, recorded in Hansard and publicly available, though the Committee stage of a bill are not recorded in Hansard.

Members of Parliament have limited supplies of all papers that are printed. Others are available from Government Bookshops throughout New Zealand. Of other papers, there is only one official copy, though copies may or may not be made available to each member by the Minister presenting it. For example the memorandum and articles of association tabled in the House may be photocopied if a member of the public is interested. Copies may also be available from the SOE itself. Otherwise, if an SOE wants a document printed it is likely to be done commercially.

(b) *Incentives*

The disclosure of information by the SOEs Act has an enabling and facilitating role in engendering public debate. For instance its availability may enable the opposition to criticise decisions they may not otherwise have known of, on the basis of facts they may not otherwise have known. Other pressure groups also benefit. This contributes to ministers' and boards' incentives to avoid actions that will represent a cost to them.

The limitations on disclosure are important. First, the degree to which disclosed information is useful depends on its circulation to relevant actors who can use it. The

¹⁰⁹ Under S.O. 93(2), in the Appendices to the Journals of the House of Representatives, or otherwise under S.O. 94. The printing process is supervised by the Speaker of the House under S.O. 95

shareholding ministers can be expected to have reasonable access to, and analysis of, disclosed information - through the shareholder monitoring regime, as discussed elsewhere. Parliamentarians generally receive the information but a high opportunity cost of time substantially discount the chances that full and careful analysis is undertaken. The public and media are dependent on these actors, but otherwise on the printing and distribution of the disclosed information - a matter by no means guaranteed.

A second limitation is that the real contribution of Parliamentary disclosure requirements is their marginal effect. This must be assessed against the information that would be disclosed any way, in response to other pressures. This will be assessed later in the paper.

Third and finally, The scope and content of disclosure depends to a large part on the discretion of the boards and ministers. The overall incentives of the accountability structure affect this. Certainly there are incentives on boards and ministers to conceal information which could represent a cost, and reveal information from which they may benefit. There are also incentives not to conceal information where the concealment may be costly if discovered. The interplay of incentives from other parts of the paper will determine the outcome of this process.

The experience of disclosure requirements for ordinary companies, as discussed in Part III.C, is not promising - due to incentives. The disclosure requirements of the SOEs Act are potentially greater than those of company law only in the requirement of the Statement of Corporate Intent and half yearly reports. Otherwise, the same accounts and reports are required, with the greater detail being required by the Companies Act. Even there the potential for creative accounting diminishes the value of the auditor's role and throws suspicion over the utility of audited information.¹¹⁰ SOEs face an additional element that, because of incentives, promises more honesty. Section 19 of the SOEs Act appoints the Audit Office as auditor. As an Officer of Parliament the Controller and Auditor-General may be expected not to employ such dubious practices. There would be a high cost of being accused of such practices, and due to a statutorily entrenched position, little advantage in presenting accounts in the light desired by clients. This may improve the expected quality of information given under section 15(1) paragraphs (b) and (c).

¹¹⁰ *Infra* III.C (Company Law).

C. COMPANY LAW

1. *Introduction*

Ministerial responsibility and Parliamentary scrutiny influence the behaviour of SOEs. Yet it is the choice of the appropriate form of organisation as a model that shapes and defines the essence of the SOE accountability structure. Of all the many options available,¹¹¹ the model of the limited liability company has been preferred as the legal structure for SOEs. The structure determines the scope of ministerial responsibility. It provides an pre-existing system of monitoring and institutional relationships as a basis to which Parliament can add or subtract elements to meet the aims of SOEs.

Company law played no part in the operation of departments. The incentives it now provides for SOEs were absent from the departmental model; at least in that form. In a broad sense, the comparison between the two structures is a simple one: company law provides a new set of incentives for SOEs. More specifically there are many aspects and principles of company law which must all be understood in the context of "market" pressures. Market activity is the reason that the company, as a structure, exists and is the reason that SOEs are formed as companies. Company Law governs the establishment and operation of limited liability companies. It regulates the functions, duties and powers of the various actors in the company structure. It sets a framework of incentives within which the relationships between these actors may develop, as influenced by incentives emanating from other sources. Every company has its own characteristics that may be developed within the framework of the company structure. In addition, company law does not apply to SOEs exactly as it does to ordinary companies.¹¹²

2. *Law and Economics of New Zealand Companies*

Important general legal characteristics of a limited liability company include the following: it is a distinct legal entity; it may sue and be sued; liability is limited to the

¹¹¹ E.g. Douglas Fisher, "Legal Structures for State Enterprise", *Purpose, Performance and Profit: Redefining the Public Sector*, (Proceedings of the 1986 Convention of the New Zealand Institute of Public Administration) eds. Margaret Clark & Elizabeth Sinclair, (Government Printing Office, Wellington, 1986) 124.

¹¹² This paper uses the terminology "ordinary companies" to distinguish from SOEs. The paradigm ordinary company considered in this paper is a public, listed company comparable to the SOEs.

company alone;¹¹³ it has perpetual succession; and it may own property. Consider the actors involved in the operation of a typical ordinary company. The company is owned by shareholders. As owners they may receive residual profit. The shareholders collectively appoint a board of directors to manage the operations of the company. A general manager or managing director may oversee the employment of people to carry out the company's activities. The product will be sold by contract to buyers and the company will contract with sellers to buy inputs. To finance activities funds from the equity securities of the owners may be used, as may debt securities, such as debentures, issued for a promise to repay principal and interest and perhaps some security. Unsecured credit may be advanced by trade creditors or finance houses.

(a) *Economics*

There is a significant amount of literature that applies economics to companies. This now permeates explanations of company law¹¹⁴ and the insights presented here are conventional. As outlined in Part II.A economic analysis provides explains the very reasons that companies exist. Transaction costs provide incentives for the formation of organisational alternatives to markets. Agency costs, however, may result from the organisational form. The interests of the owners are (generally) to maximise their receipt of dividends from the company, and thus company profits, over a particular time period. The interests of directors may diverge from this. A shareholder, especially a minority shareholder, could face significant costs in monitoring and deterring such behaviour. Of course, shareholders have an incentive to minimise agency costs to the extent that they perceive a gain from doing so. More recent economic analysis has recognised that methods of economising on agency costs are available through market activities. They include:¹¹⁵

- (i) the debt and equity markets, encouraging financial analysis of management performance;
- (ii) the transferability of control through shares, encouraging analysis of potential gains of a takeover and encouraging director avoidance of job loss;
- (iii) the availability of agency cost monitoring provisions in a debt contract, encouraging creditor monitoring of management performance;

¹¹³ For economic analysis of limited liability see: F.H. Easterbrook & Fischel, "Limited Liability and the Corporation" (1985) University of Chicago Law Review 89.

¹¹⁴ E.g. Farrar and Russell, *infra* n.116

¹¹⁵ For a good, relevant review of the operation of market methods: Stephen Jennings, "State Owned Enterprise Agency Issues" Paper presented to the Institute of Policy Studies Conference on "Corporatisation and Privatisation: Completing the Revolution?" Wellington, 3 September, 1987, 5-15; and Stephen Jennings & Rob Cameron "State Owned Enterprise Reform in New Zealand" in *Economic Liberalisation in New Zealand*, eds., Alan Bollard & Bob Buckle, (Allen & Unwin, Wellington, 1987 - forthcoming).

- (iv) the market for managerial labour, encouraging investment in managerial reputation;
- (v) the operations by directors in boards, encouraging inter director monitoring; and
- (vi) the availability of performance based remuneration of directors.

(b) *Company Law - general principles*

Company law derives primarily from cases, the Companies Act 1955 and the Securities Act 1978 together with regulations.¹¹⁶ Much company law can also be viewed as regulating the relationships between shareholders and directors in a company. It economises on agency costs by providing incentives for directors to follow shareholders wishes which are generally assumed to be profit maximisation. The opportunity cost of these principles being applied by law to all companies is the transaction costs that would result from companies, directors and shareholders having to agree on them on an individual company basis. The principles of company law that relate to SOEs are presented in this context in six broad areas.

(i) Constitution and control

Theoretically, a company is ultimately controlled by shareholder voting. According to the Companies Act, certain majorities are necessary for certain matters and the Act and the articles govern the mechanics of meetings and voting. For most practical purposes however, the memorandum and articles of association are crucial to control. They form the constitution of the company. They set out the fundamental rules under which the company is governed. More specifically, they allocate the power of decisionmaking between directors and shareholders. The Companies Act has a model set of 137 articles for the management of a company limited by shares in Table A of the Third Schedule. They form companies' articles unless expressly excluded or modified.¹¹⁷ They generally concern: Shares; Capital; Meetings; Directors; Dividends; Accounts; Winding Up; and Indemnity.

¹¹⁶ As general references to this part see: John H. Farrar & Mark W. Russell, *Company Law and Securities Regulation in New Zealand* (Butterworths, Wellington, 1985); and Colin Howard, *Law of Commercial Companies* (The Law Book Co. Ltd., Sydney, 1987).

¹¹⁷ Section 22 of the Companies Act 1955. All sections referred to in Part III.C will, unless otherwise stated, be of the Companies Act 1955.

Until 1984 all companies specified objects and powers in their memorandum. Actions that were outside the objects or the powers were *ultra vires* the company and void. Since the Companies Amendment Act (No. 2) 1983 objects do not have to be specified, powers are implied by statute and the effect of a lack of capacity has been lessened.¹¹⁸ In addition, the memorandum and articles are a binding contract between the company and the shareholders.¹¹⁹ The "contract" can be modified by the company by special resolution.¹²⁰ It is only binding on shareholders *qua* shareholders.

(ii) Financial structure

The financial structure of an ordinary company is made up of debt, equity and hybrid securities. Each type of security has advantages and disadvantages in terms of the holder's return, ability to transfer, ability to control, tax implications etc. Generally, equity securities confer rights of control and the possibility of residual profit. Debt securities generally guarantee a set, periodic rate of return and involve no control other than in respect to matters directly affecting the security. Disclosure of certain aspects of debt and equity security issues is required by the Securities Act 1978.

(iii) Director liability

The liability of directors is an obvious and direct method of controlling agency costs. There are two main sources of director liability. First there are statutory penalties on directors personally for a variety of undesirable activities.¹²¹ Particularly, sections 190 to 199 govern the disclosure of director's interests. Second, equity and tort are relevant to company directors in the variety of duties that apply to them. Commentators have identified several variations of fiduciary and tort duties.¹²² Directors must: (a) must act bona fide in the interests of the company; (b) must not exercise powers for an improper collateral purpose; (c) must exercise reasonable skill and care as may be expected of a person of the knowledge and experience; and (d) must not place themselves in a position where their duty to the company may conflict with their own interests.

¹¹⁸ Sections 14A, 15A and 18A of the Companies Act 1955. Section 15A states that "a company has the rights, powers, and privileges of a natural person".

¹¹⁹ Section 34. The wording of this section is particularly arcane. See Howard *supra* n. 5, 360-361 on the 1986 Australian wording.

¹²⁰ Section 24.

¹²¹ E.g. ss. 88(2), 102(10), 116(3), (5), 117(6), 118(4), 119(4), 121(4), 185(5), 130(6), 131(3), 132(2), 231(5), 151(7), 152(3). And see generally s.463.

¹²² Farrar & Russell, *supra* n.116, 224.

Care must be taken not to ascribe rigid boundaries or certainty to these fluid "categories". Generally the law is concerned that fiduciaries not abuse their position of trust.¹²³ However courts are traditionally cautious about passing ethical judgments on the activities of business people. A wide view is taken of what may properly constitute business judgement. This is reflected in the standard of care which is conventionally criticised for lack of rigour:¹²⁴

"it must be questioned whether [the law] has not gone to the other extreme of positively encouraging incompetent people to accept directorships(sic.), safe in the knowledge that the law expects little or nothing of them."

However, it may be that New Zealand courts are developing a harder line on the standard of care and the traditional case law can be interpreted to support this. In addition it is not certain the New Zealand directors have much appreciation one way or the other of the strength or laxity of directors' legal duties.

An obstacle to successful actions against directors derives from the rule discussed in the leading case of *Percival v. Wright*¹²⁵ that directors owe duties exclusively to the company rather than to the individual shareholders. The rule in *Foss v. Harbottle*¹²⁶ prohibits individual shareholders from suing in respect of the breach of directors' duties. There are certain exceptions to this¹²⁷: acts that are illegal or ultra vires the company; acts that must be ratified by special resolution; a personal action by the shareholder; or a fraud on the minority and control rests with the directors. If these exceptions are not applicable and a shareholder cannot convince the company to pursue an action, statutory relief must be sought under section 209 of the Companies Act. Section 209 allows an application by a member of a company on the grounds that an act or the affairs of the company are "oppressive, unfairly discriminatory or unfairly prejudicial" to that member. A court may grant such relief as it thinks fit if it is just and equitable to do so.

Overall, the area of directors' duties is nebulous and unpredictable. There are problems in predicting the duty and standard of care. There are procedural problems in enforcing even that for some shareholders. There is also difficulty in discerning the impact that the duties have on directors. The existence of director duties, though, may be expected to play some (increasing?) part in controlling "outrageous" director behaviour.

¹²³ Generally, see *Coleman v. Myers* [1977] 2 NZLR 225 (CA).

¹²⁴ Farrar and Russell, *supra* n.116, 235.

¹²⁵ [1902] 2 Ch. 421.

¹²⁶ (1843) 2 Hare 461.

¹²⁷ Farrar and Russell, *supra* n.116, 258-265.

(iv) Use and distribution of company assets and funds

Specific types of behaviour on which directors' and shareholders' and others' interests may diverge include the use and distribution of assets and funds. These are the subject of specific provision in the Companies Act and case law.¹²⁸ Distributions of company capital may unfairly diminish the equity cushion thereby disadvantaging creditors. Reduction of share capital, dividends, redemption of preference shares and other distributions are governed by the Companies Act.¹²⁹ Similarly the rule in *Trevor v. Whitworth*¹³⁰ prohibits the repurchase of own shares by a company, though redeemable preference shares are an exception to this.¹³¹ Provisions against the financial assistance by companies of the purchase of their shares also exist. They inhibit bootstrap takeover operations.¹³²

(v) Reporting requirements

Another set of restrictions on company related behaviour are the requirements of reporting, disclosure and audit. Sections 151-162 of the Companies Act govern: the keeping of and access to company records; the annual disclosure of a profit and loss account, a balance sheet, an auditors' report and a directors' report.¹³³ There are detailed provisions governing the contents of these documents, most notably the requirement that a "true and fair view of the state of affairs of the company" be reflected by the accounts.¹³⁴ Other provisions govern the (required) appointment of the auditor, disqualification of an auditor and the auditor's powers. Other reporting requirements are found in the Income Tax Act, the Stock Exchange Listing Rules and the New Zealand Society of Accountants' Statements of Standard Accounting Practice.

There is a serious question, an in depth study of which is beyond the scope of the paper, as to the content of information that is required by these documents. There is a perception by many¹³⁵ that New Zealand accounting standards and requirements are ineffectual in providing useful information from which a true assessment of a

¹²⁸ See generally about these areas, R. Dugan "Repurchase of Own Shares" (1987) 17 V.U.W.L.R. 179.

¹²⁹ E.g. sections 75-80.

¹³⁰ (1887) 12 App. Cas. 409.

¹³¹ Under s. 66.

¹³² Section 62.

¹³³ Sections 154-158 concern group accounts.

¹³⁴ Section 153 and the Eighth Schedule.

¹³⁵ E.g. John McManamy "Accounting the creative way" *New Zealand Sunday Times*, October 12 1986, 19.

company's financial performance, situation and prospects may be gained. The Companies Act requirements are detailed, but it is always difficult to provide enough detail to prevent circumvention by creative accounting while retaining sufficient flexibility to deal informatively with a variety of situations. The "true and fair view" requirement offers more promise, but is mainly unenforced. If accounts are within the letter of the detailed rules they are presented. A certain amount of accountant "risk taking" in complying with the law also seems prevalent, with little remedy being sought by those affected, "the market" or the New Zealand Society of Accountants.

(vi) Takeover regulation

Takeovers and mergers are other notable forms of activity that constrain director behaviour. As referred to above, takeovers constitute market activity in the market for corporate control.¹³⁶ Takeover is said to become attractive if there is a perception that the management of a company could be improved and the share price is potentially undervalued. The threat of potential takeover and replacement of management acts as an incentive on directors to manage efficiently. (It also encourages the development of anti-takeover mechanisms). In New Zealand takeovers are regulated by the Commerce Act 1986, the Companies Amendment Act 1963¹³⁷ the Stock Exchange Listing Requirements and common law duties such as those already discussed. Broadly, for companies of a certain size, a takeover or merger requires clearance or authorisation by the Commerce Commission. This is assessed on the criteria of whether a "dominant position in the market" is created. The Stock Exchange requirements are more restrictive, for example in applying a best price rule over a 3 month period,¹³⁸ but the sanction of delisting is threatened rarely.

¹³⁶ The Treasury, *Regulation of Company Takeovers: Treasury Submission to the Securities Commission* (The Treasury, Wellington, 1984).

¹³⁷ This is practically ineffective as it relies on a written offer and there are several exceptions. It provides a notice/response information requirement.

¹³⁸ R613, NZSE Listing Rules.

3. *Company Law and SOEs*

The principle of competitive neutrality underlies the operation and establishment of SOEs:¹³⁹ "the advantages and disadvantages which state owned enterprises have, . . . will be removed so that commercial criteria will provide a fair assessment of managerial performance". True competitive neutrality would require that company law apply directly to SOEs as it does to ordinary companies. This is largely the case. The differences in the application of company law principles to SOEs are explored here. The influence of company law on SOEs can be viewed as the influence of company law on ordinary companies as modified by the differences between them and SOEs.

(a) *Machinery and Establishment*

The machinery aspects of the new SOEs are straightforward. The SOEs are limited companies. The share capital authorised by clause 3 of the memoranda is \$100,000 in each case; divided into 100,000 shares of \$1 each.¹⁴⁰ Each memorandum is signed by the Minister of Finance and the Minister responsible for the SOE.¹⁴¹ The memoranda and articles of all the SOEs are identical.

There is no legislative statement setting up new SOEs as companies. They were simply formed and registered as companies under the Companies Act 1955. This is recognised by sections 2 and 10(1) of the SOEs Act.¹⁴² Section 30(1) allows registration to happen without complication. As set out in Table 1, section 30 adjusts certain provisions regarding the establishment of a company. In an admittedly technical way these provisions are the most explicit difference to ordinary company law. The articles form a distinctive constitution for SOEs but the articles of most ordinary companies are different.

¹³⁹ Principle (d), Hon. R.O. Douglas, *Economic Statement*, Statement to the House of Representatives, 12 December 1985, (Government Printer, Wellington, 1985) 12.

¹⁴⁰ The Post Office Bank Ltd. claims in its SCI to have an authorised share capital of \$300,000. Presumably the increase complied with the provisions of the Companies Act 1955, especially s. 71.

¹⁴¹ Section 22 of the SOEs Act provides that the person holding these offices hold the shares and that transfer is not necessary on a change in the person holding the office. Since mid 1987 the responsible minister has been the same for all SOEs: the Hon. R.W. Prebble.

¹⁴² Section 2 defines "company" to mean a company formed and registered under the Companies Act 1955. Section 10(1) empowers the Minister of Finance and the responsible minister to acquire shares in new SOEs.

**TABLE 7: ADJUSTMENTS TO THE LAW RELATING TO
ESTABLISHING A COMPANY**

<u>SOEs Act Provision</u>	<u>Provision Affected</u>
Section 30(1)	Anything in any enactment or rule of law that would otherwise prevent ministers forming a company (in which they hold all the shares) and registering it under the Companies Act 1955 with the name of a new SOE.
Section 30(1)	Section 31 of the Companies Act: governing the registration of a company name.
Section 30(1)	Section 32(2) of the Companies Act: empowering the Registrar of Companies to direct a company to change its name.
Section 30(2)	Section 13(1) of the Companies Act, changing the minimum number of persons required to incorporate a company from 7 to 2.
Section 30(3)	The following sections of the Companies Act, reading references to 7 members as references to 2 members: <ul style="list-style-type: none"> - Section 41, imposing personal liability on members for debts contracted by a company while trading with fewer [2] members; - Section 217(d), empowering a court to wind up a company if the number of members is reduced below [2]; - Section 219(1)(a)(i),¹⁴³ preventing a contributory from petitioning for a winding up unless the number of members is reduced below [2].
Section 30(4)	Section 134 of the Companies Act, dispensing with the requirement to hold a "statutory meeting" of the members of the company between 1 to 3 months from being entitled to commence business. ¹⁴⁴

*(b) Corporate Constitution*¹⁴⁵

The memoranda of the SOEs do not prescribe objects.¹⁴⁶ The powers are broad as implied by section 15A of the Companies Act. Otherwise, the constitutional position of a new SOE and an ordinary company are similar - in terms of company law.¹⁴⁷ The constitution forms a contract between the SOE and the ministers and other shareholders

¹⁴³ An error in the SOEs Act omits the reference to subsection (1).

¹⁴⁴ Presumably because the shareholders are undertaking the "establishing" here.

¹⁴⁵ See part III.B (Parliament)

¹⁴⁶ Under s.14.

¹⁴⁷ Part IV of this paper examines, inter alia, what extra force is conferred by the requirement of section 5 of the SOEs Act that the board must make decisions relating to the operation of an SOE in accordance with its SCI. This requirement can be seen as a superadded element of the corporate constitution.

and equity bond holders.¹⁴⁸ If outsider rights may not be enforced, as seems likely, a minister must only enjoin an SOE to adhere to its constitution *as a shareholder*.

Certain articles from Table A are adopted, in relation to: share capital and certificates; liens over shares; transfers of shares;¹⁴⁹ transmission of shares; forfeiture of shares; and notices. The rest are divided into 30 headings in 4 parts, relating to the same general concerns as in Table A. The general headings of the articles concern: Capital and Calls on Shares; Notice of and Procedure at General Meetings; Directors' Interests and Proceedings and Committees of Directors; Certain Powers and Duties of Directors; Validity of Directors' Acts; Dividends; Capitalisation of Profits; Share Warrants; Accounts; Audit; Discovery of Secrets Winding Up; Distribution of Assets; and Indemnity. Generally, the articles allocate the power of management of SOEs to the directors. The more significant of their powers are outlined by Table 2. A more general power that is important is article 14.3.1 which provides that:¹⁵⁰

"the business of the Company shall be managed by the Directors who may exercise all such powers of the Company as are not, by the Act, or by these Articles, required to be exercised by the Company in general meeting, subject, nevertheless, to any of these Articles and to the provisions of the Act."

Shareholding ministers and only shareholding ministers may vote in shareholders' meetings. The more significant shareholder powers exercised by voting are outlined in Table 2 below. They concern the shares, directors, dividend and sale of the main undertaking. Apart from these the articles prevent the shareholding ministers from exercising significant power in the operation and management of the company. Note though, that the shareholders may, by special resolution, change any article.¹⁵¹ As noted in Part III.A the cost of changing this relationship is not prohibitive though costs in instituting an alternative relationship mean that it is unlikely to be changed without a conscious political change of will.

¹⁴⁸ Other (Redeemable Preference) Shareholders and Equity Bond holders are members. *Infra* p. .

¹⁴⁹ Though the transfer and transmission provisions of Table A do not apply to a redeemable preference share or Equity bond issued by share warrant per article 22.4.

¹⁵⁰ Article 14.3.1 is broader than article 80 of Table A as it is not subject to "such regulations, as may be prescribed by the company in general meeting".

¹⁵¹ Section 24 of the Companies Act 1955 and the disclosure requirements of s. 17(1) of the SOEs Act.

TABLE 8: SIGNIFICANT FUNCTIONS RESERVED TO SHAREHOLDING MINISTERS BY THE ARTICLES:

<u>Article</u>	<u>Subject Matter</u>
2.1	Issuance, and terms and conditions, of shares.
3.1	Increase of share capital and type of new share capital.
3.3	Consolidation, Subdivision and Cancellation of Share Capital.
3.4	Reduction of Share Capital (and capital redemption reserve or share premium account).
9.1	Determination of number of directors.
9.3	Appointment of Directors.
9.5	Determination of remuneration of directors.
10.5	Relaxation of Interested Director Articles.
14.3.1	Approval of sale or disposal of the main undertaking of the Company.
17.1.1	Appointment of Executive Directors and Managing Director if recommended by the Board.
20.1	Agree with the Board on the dividend (subject to section 13 of the SOEs Act).
20.2.9	Approval of distribution in kind of assets among members.
21.1	Issue Bonus Shares.
22.1	Issue, and determine the conditions of, Share Warrants with respect to Redeemable Preference Shares and Equity Bonds.
23.1	Inspect, or authorise inspection of, books of account.

(c) *Non-transferable Control*

A policy decision in the establishment of SOEs was not to allow control of a new SOE to pass out of the Government's hands without legislative provision. The consequences of this are manifested in: the financial structure; voting; and takeovers.

(i) Financial Structure

The financial structure of the new SOEs is similar to that of ordinary companies. Debt and equity securities may be issued and function in the usual way with the addition of a new type of security: Equity bonds. There are also restrictions on voting rights and on the transferability of shares.

The SOEs Act envisages that shares in SOEs are to be held by the shareholding ministers. Section 11(1) prevents a minister either transferring shares held in the minister's name, or permitting shares to be allotted to any other person.¹⁵² Due to the

¹⁵² The legal sanction for breaching this is judicial review - see Part III.D. Article 3.2.1 provides that "all shares and Convertible Securities [except for Redeemable Preference Shares, and presumably from the context, Equity Bonds] shall be issued only to the [shareholding ministers]". Any proposal to issue new shares to a third party would involve amending this article and would have to be approved by the shareholding ministers which is probably prevented

SOEs Amendment Act 1987, though, it is possible that an initial allocation of shares in a newly established SOE could be made to a third party without legislative amendment.¹⁵³ A specific legislative exception to section 11(1) is the issuance of non-convertible, non-voting, redeemable preference shares.¹⁵⁴ Preference shares are issue specific but they generally have some similarity to debt securities in conferring preferential rights to dividends or on winding up but carrying no voting rights.¹⁵⁵ Redeemable preference shares may be redeemed by the company on certain conditions.¹⁵⁶ Note that redeemable preference shares do not carry voting rights at general meetings. Shareholders may vote at a "special meeting", per the articles,¹⁵⁷ on the modification of their rights.¹⁵⁸ Otherwise the articles enable a new SOE to issue various classes of share with various characteristics - to ministers. An SOE may consolidate, divide or cancel its share capital. There are also provisions governing calls on shares.¹⁵⁹

The Government has indicated that Equity Bonds will be issued by some SOEs in the near future.¹⁶⁰ There are plans to list them on the New Zealand Stock Exchange. There are several peculiar characteristics of Equity Bonds - apart from their solely political heritage. Section 12(1) of the SOEs Act empowers an SOE to issue Equity Bonds to anyone (including shareholding ministers) "if authorised to do so at any time or times by resolution of the House of Representatives".¹⁶¹ Section 12(2) confers on them the following characteristics:

- (a) they confer no voting rights at general meetings of shareholders;
- (b) they are transferable as provided in the rules;
- (c), (d) they are deemed to be ordinary shares for the purposes of the Companies Act 1955, the Securities Act 1978 and the Income Tax Act 1976 (with corresponding meanings for "shareholder" and "dividend"); and
- (e) they have other characteristics as specified in the authorising resolution or as determined by the shareholding ministers.

by section 11(1)(b). (Note that article 2.1 provides that securities may be issued with such restrictions as to voting as the SOE may, by ordinary resolution, determine).

153 The SOEs Amendment Act 1987, inter alia, removed the words "all the" from section 10 which previously read: "[A shareholding minister] may from time to time, . . . subscribe for or otherwise acquire all the shares in the [new SOEs]". When an initial allocation of shares is being made, a minister is not a shareholder and therefore section 11(1) may not apply.

154 Issuable per section 66 of the Companies Act 1955 and articles 2.2.1 and 3.2.2.

155 Farrar and Russell, *supra* n.116, 128-133.

156 The conditions control the source of redemption and of any premium.

157 E.g. per article 2.3.1.

158 This would lower the value of SOE shares compared to ordinary company shares. Also, it would conflict with r. 421 of the NZSE Listing Requirements.

159 Articles 2.3, 3 and 4.

160 *Budget 1987, Pt I Speech*, New Zealand Parliament. House of Representatives. 1987, B.6: 12.

161 The "resolution" will be a Government notice of motion. It will not be referred to a select committee. See Hon. R.O. Douglas' answer to question 12 on 29 July 1987, N.Z. Parliamentary Debates, Vol. 482, 1987; 10,635.

It is mainly from sections 12(2)(c) and (d) that Equity Bonds derive their character. In most ways, they seem to be equivalent to non-voting ordinary shares.¹⁶² The articles of the SOEs include Equity Bonds in their definitions of "share"¹⁶³ though the SOEs Act itself, as amended in 1987, specifically excludes Equity Bonds from the definition of "share".¹⁶⁴ Holders of Equity bonds are shareholders (except for the purposes of the SOEs Act) and members of the SOE.¹⁶⁵

(ii) Voting

The articles provide for the voting rights and procedures of SOEs. Annual General Meetings must be called every calendar year. Other meetings are "extraordinary general meetings" and are convened by the Directors or shareholding ministers.¹⁶⁶ All business at general meetings is special.¹⁶⁷ The quorum is the two shareholding ministers in person or by representative. The Chairman of Directors or other director chairs general meetings. All classes of shareholders (including Equity Bond holders, also Auditors¹⁶⁸) are entitled to receive company notices, reports and accounts, and to attend general meetings.¹⁶⁹ The only persons allowed to vote are the shareholding ministers or their representatives and voting is by voice and show of hands.¹⁷⁰ Note that this effectively requires unanimous decisions whether for special, extraordinary or ordinary resolutions.¹⁷¹

(iii) Takeovers

Takeovers are relevant to SOEs in so far as they cannot occur, thereby providing another distinction with ordinary companies. The agency cost economising influence of takeovers is therefore absent - a factor much emphasised by some economists.¹⁷²

¹⁶² A description approved by the Hon. R.O. Douglas in written answer to Question 5 on 2 July 1987, N.Z. Parliamentary Debates, Vol.482, 1987; 10,220.

¹⁶³ Article 1.2, though this often seems to have been forgotten; e.g. in article 3.2.1 which is explicitly made subject to different provisions for redeemable preference shares in 3.2.2 but not Equity Bonds per 3.2.3 though such seems required by the context.

¹⁶⁴ Section 2, "share", except in sections 14. and 22 which relate to the SCI and Provisions relating to Ministers' shareholding, respectively.

¹⁶⁵ Concerning status as members: section 39 of the Companies Act 1955 and the definition of "member" in article 1.2.1.

¹⁶⁶ Or under s.136 of the Companies Act 1955.

¹⁶⁷ With certain exceptions at the AGM.

¹⁶⁸ Section 166(4) of the Companies Act 1955.

¹⁶⁹ Article 7.5. The right to attend meetings is subject to any direction to the contrary by the company in general meeting.

¹⁷⁰ Article 8.2.

¹⁷¹ Because voting is not according to number of shares (c.f. s.138(e), 142), there are only 2 ministers and they must have half the shares each (per ss. 10(1),(2) and 11(1) of the SOEs Act).

¹⁷² Jennings supra n.115.

This argument is based on an insufficiently defined view of the notion of "agency". Ordinary companies may not be managed "efficiently" thus stimulating a takeover. An efficient management incentive is therefore provided by the market for corporate control. But it economises on agency costs only if the original owner desired efficiency - which is presumed in ordinary companies. Application of the market for corporate control to SOEs may provide extra efficiency incentives but it does not necessarily economise on agency costs. Indeed the strong controlling position of shareholding ministers (bearing in mind the ability to change the articles) indicates that shareholder control of the agent may be well effected. The problem in the SOE context, as noted in Part II, is that efficiency is a desired objective, but there may also be other objectives.

Note that the listing of Equity bonds will go some way toward fulfilling some of the other functions of shares, but since they do not carry voting rights, their acquisition cannot lead to a change in control.¹⁷³

(d) *Director liability*

The directors have the function of making "all decisions relating to the operation of [an SOE]"¹⁷⁴ - to manage the business.¹⁷⁵ There are 5 - 9 directors of each SOE (including up to 3 Executive Directors)¹⁷⁶ who may be appointed (or reappointed) for up to 3 years.¹⁷⁷ There are several circumstances in which a director's office is vacated.¹⁷⁸ Director remuneration is determined by the shareholding ministers. Note that as in Table A, directors may appoint committees of any persons to which they may delegate any of their powers.¹⁷⁹ In relation to certain "operational" decisions such delegation may not be legally valid.¹⁸⁰

SOE director liability is little different from that of ordinary company directors. The statutory duties apply to SOE directors as to ordinary directors. Article 10 governs interested directors in a similar way to article 84 of Table A though in addition the Chairman of a meeting is given conclusive authority to rule on the materiality of interest,

¹⁷³ Ibid. 27.

¹⁷⁴ Section 5(2) of the SOEs Act.

¹⁷⁵ Article 14.3.1.

¹⁷⁶ Article 17.1.1. One of whom may be appointed as a Managing Director.

¹⁷⁷ For the details of this paragraph, see Article 9.

¹⁷⁸ Bankruptcy or insolvency; a section 189 court order; mental disorder; resignation; expiry of appointment; removal by the company per section 187; failure to attend 2 consecutive board meetings without permission. C.f. article 88 of Table A.

¹⁷⁹ Article 13.1.

¹⁸⁰ See Part III.D

and the Company may, by ordinary resolution, relax the requirements of Article 10. Fiduciary duties in relation to corporate opportunities, for example, are the same as for ordinary directors. Since two ministers own the voting shares there is no problem of enforcement for them. Equity Bond holders and redeemable preference share holders do have a problem since they can not even instigate a vote to force a company to sue directors and the rule of *Foss v. Harbottle* limits the derivative actions available to them. They (and shareholding ministers) may use section 209 of the Companies Act to gain a "remedy in case of oppression" if a court thinks it would be "just and equitable" to grant one.

(e) *Disclosure and Audit*

There is no difference between SOEs and ordinary companies in the content of material required by company law to be disclosed. There are extra disclosure requirements emanating from other sources - as discussed in Part III.B.

Section 19 of the SOEs Act constitutes a distinction between SOEs and an ordinary company. It provides that the Audit Office shall be the auditor of all SOEs and may exercise the functions, duties and powers of an auditor appointed under the Companies Act as well as the powers it has under the Public Finance Act 1977 in respect of public money and public stores. Its fees are to be prescribed by the Minister of Finance. In addition, after consultation with the Audit Office and with the approval of the responsible minister, an SOE board may appoint a suitably qualified firm as an additional auditor, but not as a substitute.

As noted in Part III.B, for incentive reasons, this might constitute a significant potential difference with ordinary companies. As an Officer of Parliament the Controller and Auditor-General may be expected not to indulge in creative accounting. From the perspective of company law however, competitive neutrality is violated by the extra accountability. The broader issue, addressed later, is whether competitive neutrality or accountability should outweigh the other.

(f) *Group Windings Up*

One remaining distinction between SOEs and ordinary companies concerns sections in the Companies Act relating to winding up of related companies: sections 311B, 311C, 315A and 315B of the Companies Act. These provisions concern: setting aside securities, charges and transactions involving inadequate or excessive

consideration, and contribution between and pooling of, assets of related companies all in a winding up context. Because shares in the SOEs are now held by the Minister of Finance and one Minister responsible for all SOEs, all SOEs are "related" per section 5(2)(c). In practice sections 311B, 315A and 315B probably have little effect. They relate only to winding up contexts. Also a court must be satisfied that it is "just and equitable" to treat the companies as related and for the latter two sections mere relationship alone cannot be enough to satisfy this test.¹⁸¹ Strictly interpreted section 311C could apply to a contract of supply between two SOEs for consideration that did not reflect the value of the goods supplied, but a liquidator and court may take the view that the definition of "related" applies only artificially to SOEs.

¹⁸¹ Section 315C(3).

4. *Shareholder Monitoring Regime*

In economising on agency costs, the shareholder monitoring regime is vital to the shareholder - director relationship. It provides for scrutiny of management decision-making and for the basis of corrective action in case of a perceived inadequacy in that decisionmaking. As noted in Part III.A, for the purposes of determining the scope of ministerial responsibility, the SOEs Act provides ample scope for any sort of shareholder monitoring regime to be instituted. The answer to the question of the appropriate shareholder monitoring regime for SOEs has not been finally determined at the date of writing. A Treasury proposal, "approved in principle" by Cabinet was released for public discussion on 10 June 1987 and encountered vehement criticism by the SOEs.¹⁸² The importance of the question is briefly examined here and views expressed as to the directions of the appropriate policy.

What is the appropriate relationship between shareholder and director? The preceding analysis was vitally concerned with aspects of the relationship due to the importance of agency costs emphasised by an economic view of organisational accountability. Yet the role of company law lies in *enabling* the organisation of activity and monitoring of management rather than determining how exactly the it is to be done. Company law does not *determine* the operating relationship between shareholders and directors that develops in practice. As noted already, a wide variety of relationships between shareholder and director may occur within the same formal company structure.¹⁸³ They depend mainly on the number, voting strength and wishes of the shareholders. Company shares may be closely or widely held. Control may be exercised by a large majority shareholder or by a coalition of several minority shareholders. These factors determine whether the shareholders will require a large amount of control, reporting and disclosure from and by the board, or not. For instance, the board of a wholly owned subsidiary will face different demands from its shareholders than that of a large, widely held, publicly listed company. The possible shareholder-director relationships form a continuum of dominance from the one to the other.

When using the company as a model for a new form of organisation the variety creates a dilemma. Which is to be followed? The Treasury proposal is based on the model of a wholly owned subsidiary.¹⁸⁴ It provides for a relatively high degree of ex

¹⁸² The Treasury, *Commercial Performance of State-Owned Enterprises: Principles for Shareholder Monitoring*, (Wellington, 1987).

¹⁸³ Farrar and Russell, *supra* n.116, Chapter 17.

¹⁸⁴ The Treasury, *supra* n.171, 3.

post monitoring of SOE performance by officials, plus trigger reporting mechanisms on the occasion of a cause for major concern, and periodic in-depth reviews of performance. The ground rules of the continuing monitoring include provision by the SOE of: full financial information following NZSA principles; annual business plans; annual operating budgets; board papers, monthly; six monthly progress reports; and the annual report, audited accounts and all end-of-year reports to the board.¹⁸⁵ Some of these requirements seem already to exist as per the SOEs Act disclosure requirements and the Statements of Corporate Intent. It combines to form a formidable array of information available to the shareholders.

The SOE directors argue that it is more appropriate to view SOEs as widely held companies - held by the New Zealand taxpayers, for whom ministers are merely representatives. Consequently the reporting requirements should reflect those of a company where the board is dominant over the shareholders.

These respective positions may be predicted by an analysis of the incentives facing officials and boards. The question remains of the appropriate relationship remains. This paper adopts an argument that has as its goal consistency with the current policy environment. The problem that instigated the SOE experiment was inefficient performance by the state trading organisations caused by mismanagement. To remove the influence of political considerations and introduce efficiency incentives, SOEs were set up on the model of the company. Politicians are still to have overall regard for the performance of the SOEs but directors are to make the operational decisions. A subsidiary model for the relationship between the two is therefore inappropriate - close shareholder (political) control is not desired and therefore reporting that encourages political intervention is inappropriate. Shareholders should have *ex post* monitoring and sufficient control to enable them to take action remedy deficiencies as would a significant shareholder in a widely held company. If that is inadequate, it is an inadequacy that occurs generally with such companies. The other accountability mechanisms surveyed in this paper, such as those in company law and in the SOEs Act, will also operate to reduce agency costs.

The implications of this for the exact reporting requirements may well be a less stringent version of the Treasury proposals. The detailed reporting requirements might be replaced by a bi-monthly shareholders report indicating the general state of SOE activities. Additionally, a team of analysts with no special legal powers could be employed to report on SOEs annually. Certainly contingency plans for the occurrence of

¹⁸⁵ *Ibid.*, see especially the summary of Highlights Summary and Summary Report.

a major problem should be in place. There may also be a role for a medium term periodic review of SOEs generally to assess the adequacy of the accountability mechanisms in terms of performance.

It should be noted that the detailed shape of a shareholding monitoring regime could be changed for the price of developing a new one. As explained in Part III.A, it is not legislated for.

5. *Incentives*

Company law provides the essential institutional framework within which SOEs' actors' incentives interrelate and produce "company" behaviour. It provides both explicit legal mechanisms to control agency costs and the framework within which market behaviour can do the same. It is always apparent that the company structure developed to perform in markets. This fundamentally shapes the incentives derived from company law, and indeed was the reason for choosing the company structure as the basis of SOEs. The incentives provided by general company law to align director behaviour with shareholder wishes - profit maximising efficiency - generally apply to SOEs. The specific distinctions between SOEs and ordinary companies are firmly based in the policy decisions taken in establishing SOEs. Some of them have interesting effects on incentives.

The constitution formed by the memorandum and articles allocates management power to directors as any company constitution might. In doing so it effects the policy of separating power over operational and general policy decisions. Yet the articles may be altered by special resolution of the shareholders and there are few statutory provisions that lay a firmer basis for that view of SOE power. The incentives that would lead to a change in the separation policy are, as discussed in Part III.A, political. A conscious decision made on political grounds faces little cost in effecting a change.

The principle of non-transferable control has significant consequences. One is to create a new security, Equity bonds, though the name seems the most distinctive feature when compared to non-voting shares. Though Equity bond holders may attend meetings, neither they, nor any person other than the shareholding ministers, may vote. There is thus no diffusion of effect of shareholder incentives - the ministers incentives may be given free expression in exercising that corporate power allocated them. The lack of transferable control inherently prevents takeovers, thus denying the role of the market for corporate control in controlling agency costs. A closer analysis of this

argument though, indicates that the market provides an incentive for efficient behaviour rather than controlling real agency costs.

The requirement on an SOE to appoint the Audit Office as auditor may distinguish its accounts from those of ordinary companies. As analysed in Part III.B, the Controller and Auditor-General faces different incentives than do private auditors. The status and security of the position are relevant. There is little incentive to please a client who is statutorily bound to be audited by the Audit Office. Indeed, reputations of Auditors-General are made by well grounded public criticism of accounting methods. Against this should be weighed the time available to the Audit Office to carefully scrutinise accounts.

Finally, the incentives emanating from and influenced by the shareholder monitoring regime are part of the influence of company law and practice. The ultimate point to be made here is that the shape of the monitoring regime at any given time will be dependent on political incentives. The statutorily enabling, and informal basis of the regime means that, as with the distribution of management power, a conscious decision made on political grounds faces little cost in effecting a change. The monitoring regime currently under discussion should, if the current policy environment is to be consistent, allow only ex post monitoring of most management decisions and an ability to remedy apparent deficiencies.

D. JUDICIAL REVIEW

1. Introduction

Like other statutes the SOEs Act can be interpreted by the courts. Actions done or decisions made under its authority may be reviewed. The general principles of such court scrutiny are labelled "judicial review" normally of "administrative action". Judicial review of administrative action in New Zealand has grown increasingly rapidly in inventive directions since 1960.¹⁸⁵ Designed to curb abuse of administrative power, judicial review rests on two foundations: (1) a series of implications that courts are prepared to draw about the intention of Parliament when allocating power by statute; combined with (2) a wide view of the proper role of the judiciary in public law.

SOEs are surrounded by statutorily conferred power. The State-Owned Enterprises Act 1986 is the umbrella legislation governing the new SOEs and in itself constitutes an important distinction from ordinary companies. Its various provisions may, in general, be enforced by court action. Courts may review actions under it according to principles of judicial review.¹⁸⁶ The ramifications of this are explored here by way of an economic analysis of the elements of judicial review as applied to SOEs.

2. Judicial Review and Economics

The economic function of the principles of judicial review is straightforward. It is to impose costs on behaviour that, it has been decided, is undesirable. The cost associated with the behaviour will deter it. The extent of deterrence is dependent on individuals' perceptions of the probability of imposition of the cost and of the amount of the cost. This depends on such factors as: the certainty of the principles; the degree of general awareness of judicial review; costs, such as procedural difficulty, of initiating action; remedies; efficiency of the legal process; and degree of error in decisionmaking.

The principles of judicial review are briefly considered here before applying them to SOEs.

¹⁸⁵ K.J. Keith, "Administrative law reform 1953-1978" (1978) 9 V.U.W.L.R. 427.

¹⁸⁶ On administrative law generally, see: Ian Thynne & John Goldring *Accountability and Control: Government Officials and the Exercise of Power*, (Law Book Co. Ltd., Sydney, 1987); S.A. De Smith & J.M. Evans eds., *De Smith's Judicial Review of Administrative Action* (4th ed., Stevens & Sons, London, 1980); *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* ed. Michael Taggart, (Oxford University Press and the Legal Research Foundation Inc., Auckland, 1986).

(a) *Application Procedure and Remedies*

The main problem with the traditional remedies of judicial review - prerogative writs - was the restrictive and complex nature of the procedure necessary to ensure their availability. In 1972 it was decided that the transaction costs of the limitations of the writ procedures were too high. The Judicature Amendment Act 1972 simplified proceedings so that the remedies under the writs, as well as injunctions and declarations, were available without so much procedural complexity. This is achieved by a procedure known as an application for review which is now used in most actions seeking judicial review. Under the Judicature Amendment Act 1972 an application for review must relate to an "exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power".¹⁸⁷ There are several important definitions in section 3 that relate to this: "person"; "statutory power"; and "statutory power of decision" (the last occurs in the definition of statutory power).¹⁸⁸

The old prerogative writs are still available as remedies within the limits of the High Court Rules 1985 and the Judicature Amendment Act 1972.¹⁸⁹ Mandamus compels performance of a public duty. Prohibition prohibits the exceeding of jurisdiction. Certiorari quashes a decision where there is a lack of jurisdiction. An injunction to restrain a breach of duty is available under the same part of the Rules in addition to deriving from equitable jurisdiction.¹⁹⁰ A declaration is available under the High Court Rules or under the Declaratory Judgments Act. Some of the extraordinary remedies are available only in relation to certain grounds of review, but injunctions and declarations are broad enough to cover most conceivable situations.

¹⁸⁷ Section 4(1).

¹⁸⁸ "Person" includes corporate bodies and other "bodies of persons".

"Statutory Power" includes: a "power or right conferred by or under any Act or by or under the constitution or other instrument of incorporation, rules of any body corporate:

(b) to exercise a statutory power of decision; or

(c) to require any person to do or refrain from doing any act or thing that, but for such requirement, he would not be required by law to do or refrain from doing".

"Statutory power of decision" means "a power or right conferred by or under any Act, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate, to make a decision deciding or prescribing or affecting

(a) the rights, powers, privileges, immunities, duties or liabilities of any person; or

(b) the eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not".

¹⁸⁹ Part VII of the High Court Rules 1985, Rs 623, 625, 626.

¹⁹⁰ Rule 624 of the High Court Rules.

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(b) *Grounds*

There are several recognised grounds

(i) Ultra vires or Illegality

Legislative provisions as to authority must not be exceeded. Generally, an action that requires a decision ultra vires.

An action which does not follow a requirement of law. Traditionally, whether or not the breach required a mandatory requirement was "mandatory" or "directory" compliance was required. Courts are now taking a more common sense approach of regarding "all relevant circumstances" of non-compliance, the achievement of the purpose, and the inconvenience that results, are relevant.

Substantive ultra vires is a more complex concept. Beyond what is empowered to be done is ultra vires or a worded power may be reviewed using a "reasonableness" test. Substantive ultra vires are aspects of abuse of power, related grounds of repugnancy and uncertainty. A power is repugnant to an Act under which it is made if it is of uncertainty in the exercise of a power which

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(ii) Natural Justice and Fairness

It may be necessary to comply with the requirements of natural justice in the context of decisionmaking in relation to powers conferred by law. The right to a fair hearing. The relevant provisions of the Bill of Rights are obviously relevant to implying such a duty. The importance of the subject matter; the conditions of

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y be taken; and

191 *A.J. Burr Ltd. v. Blenheim Borough Council* [1951] 1 NZLR 100 (CA).
192 *Reade v. Smith* [1959] NZLR 996; *New Zealand Road Carriers* [1982] 1 NZLR 374 (CA).

193 *Combined State Unions v. State Services Commission* [1978] 1 NZLR 742, 745.
194 *Transport Ministry v. Alexander* [1978] 1 NZLR 742, 745.

195 *Durayappah v. Fernando* [1967] 2 AC 337.
Wellington v. New Zealand Road Carriers [1982] 1 NZLR 374 (CA).

the significance of the sanctions available. More recently the legitimate expectations of the affected person have assumed increasing importance.¹⁹⁶

The same considerations are also relevant in determining the extent of the duty imposed. Particular aspects can include: notice of time and place of hearing and the charges; opportunity to prepare, put a case, call witnesses and cross examine; disclosure of all information; and legal representation. Also, there are rules against bias on the part of the decisionmaker in relation to: pecuniary interests; personal connections; and prejudgement of a case. More recently natural justice has been expressed in substantive as well as procedural terms, viz. that a decision must be based on evidence of probative value, and that evidence and argument must be fairly heard.¹⁹⁷

Procedural fairness is a broader concept than natural justice. It now appears to have developed into a separate notion in the United Kingdom and may be viewed as such in New Zealand.¹⁹⁸ It is especially applicable in an administrative rather than judicial context.¹⁹⁹ Its criteria are unclear but in practice its requirements are likely to be similar to those of natural justice.

(iii) Abuse of Discretion

Where a body is acting pursuant to a statutory discretion there may be no question of natural justice considerations being relevant or the act being ultra vires. Yet there may still be legal objection to it if the discretion is "abused". This concept can be simplistically divided into three concepts: taking into account irrelevant considerations or not taking into account relevant considerations; taking into account improper purposes or not taking into account proper purposes; and unreasonableness.²⁰⁰

Whether a consideration is relevant or irrelevant is to be determined from the express or implied language of the statute together with its context and purpose. The purpose for which a discretion or power is exercised must be that envisaged by the provision. Otherwise it may be improper taking into account: the scheme of the Act; the nature and purpose of the particular provision compared to others; and the relationship

¹⁹⁶ *Schmidt v. Secretary of State for Home Affairs* first case (Denning) ; *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 (HL).

¹⁹⁷ *Re Erebus Royal Commission* [1983] NZLR 662 (PC).

¹⁹⁸ *CCSU* supra n.186 and *Anderton v. Auckland City Council* (1978); though *Stininato v. Auckland boxing Association* [1978] (CA) is still most authoritative - the other way.

¹⁹⁹ *CCSU* supra n. 186, esp Lord Diplock.

²⁰⁰ For other (mainly tripartite) divisions: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, 228-229; *CCSU* supra n. 186, Lord Diplock; and Rt Hon Sir Robin Cooke, "The Struggle for Simplicity in Administrative Law" in *Judicial Review of Administrative Action in the 1980s* supra n. 176, 5. Bad faith seems to the writer to be a psychological condition which is, in practice, accompanied by one of these three types of abuses.

between the decisionmaker and others.²⁰¹ It may be that being "substantially influenced" by other purposes is enough to invalidate the exercise of a discretion.²⁰² Finally, a person acts unreasonably if no reasonable person could have so acted.²⁰³

(iv) Exercise of Discretion

In addition to the abuses of discretion described above, other rules are concerned with the influences on a discretion that is otherwise validly exercised. Three important elements are: delegation; acting under an overriding policy and acting under dictation. There are strict rules governing the delegation of a discretion entrusted to a specific body. Whether delegation is effective depends on factors such as: the nature of the subject matter; the degree of control retained; and the character of the delegate.²⁰⁴ If a body has a statutory discretion, it may not exercise it pursuant to an overriding policy. While it may be reasonable to have a policy, there must be an ability to consider cases aside from the policy.²⁰⁵ Similarly, a body charged with a discretion may not act under the dictation of a third party. A prerequisite set by a third party need not be followed, a third party's views may not be determinative, nor must the approach to the decision be the same as the third party's.

(c) Limitations

To pursue a claim an applicant must possess sufficient "standing". One aim of standing rules is to economise on court administration costs by imposing a procedural cost on those with no obvious incentive to bring an action. Courts' time should not be wasted by "busybodies" far removed from the issues. Traditionally the tests for standing have varied for each remedy though the "sufficient interest" test has been influential.²⁰⁶ It now seems that standing may increasingly be approached on a case by case basis having regard to the facts and law concerned.²⁰⁷ There is a trend towards courts taking a flexible, and often liberal, stance towards the question of standing. The factors weighed include: scope and purpose of the statutory provision; gravity of the

²⁰¹ *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).

²⁰² *Poananga v. State Services Commission* [1985] 2 NZLR 385.

²⁰³ *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] AC 1014.

²⁰⁴ Ministerial delegation to a Government Department is a special case.

²⁰⁵ *British Oxygen Co. Ltd. v. Minister of Technology* [1971] AC 610; *Re Findlay* [1985] 1 AC 318.

²⁰⁶ Now enacted into English Law by s. 31(3) of the Supreme Court Act 1981.

²⁰⁷ *IRC v. National Federation of Self-Employed and Small Businesses Ltd.*, [1982] AC 617; *Wall v. Livingston* [1982] 1 NZLR 734, 739; *Finnigan v. New Zealand Rugby Football Union Inc.* [1985] 2 NZLR 159.

allegations; strength of the case; public interest; nature of the remedy; nature of the injury; and previous connection with the issue.²⁰⁸

In addition a court's power to review is dependent on its jurisdiction. The concept of Jurisdiction can be seen as similar to ultra vires in a judicial context. However, a privative clause that purports to restrict or exclude the jurisdiction of a court may not be as effective as it appears. For example, a clause may provide that a "determination" shall not be questioned by a court. Yet it must be within the jurisdiction of a court to determine whether an order is a determination or not.²⁰⁹

There are two main potential sources of authority in relation to which judicial review can be invoked with respect to SOEs: the SOEs Act 1986 and, subordinately, the rules and perhaps the SCJ of an SOE. There are essentially two areas in which judicial review is directly relevant: education and health care decisions. The SOEs Act 1986 also confers powers and duties on the Crown and the SOE. For most purposes in this part there are treated as the education and health care respectively. As mentioned in Part III A power in relation to SOEs can be characterised as controlling, management functions, monitoring functions, or other public regulatory functions. The SOEs Act provides the basis for most monitoring functions. The SCJ does not have such a role in section 3 of the Act enforces its rules. The rules may, inter alia, also confer some types of monitoring to be undertaken. The prime function of the rules is to allocate management power, with which the SOEs Act is (arguably) concerned only in broad, enabling terms.

As is clear from the paper so far, the structure of the SOEs legislative framework is complex. In relation to management, decisions are given broad operational power by the Act but exercised in accordance with the SCJ. The Act says little explicitly about what overseeing role ministers have in relation to management though it sets out the broad principles and objectives to govern the SOEs. The articles allocate most management power to directors, leaving the shareholding ministers with certain important statutory functions. The Act has a set of explicit monitoring provisions in the form of disclosure duties on the directors and additional powers to require disclosure. Ministers are conventionally and legislatively responsible to Parliament for the performance of their functions. Ministers are also responsible for matters that touch upon indirectly on SOEs. Examples are responsibility for regulatory legislation and responsibility for the overall control of an area. Overall, the competitive neutrality

²⁰⁸ Grahame Aldous & John Alder, *Applications for Judicial Review: Law and Practice* (Butterworths, London, 1985) 95-6.

²⁰⁹ *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147; *Bulk Gas Users Group v. Attorney-General* [1983] NZLR 129 (CA).

3. *Judicial Review and SOEs*

Principles of judicial review of actions and decisions in the SOE context may be informed by the principles applied to other public corporations. However, the *sui generis* nature of the legal framework of the new SOEs - limited liability companies governed by broad statutory principles and a monitoring regime - limits the relevance of those applications. The following account examines judicial review of SOEs.²¹⁰

(a) *Functions, Powers and Duties*

There are two main potential sources of authority in relation to which judicial review can be invoked with respect to SOEs: the SOEs Act 1986 and, subordinately, the rules and perhaps the SCI of an SOE. There are essentially two actors to whom judicial review is directly relevant: ministers and (board of) directors. The SOEs Act 1986 also confers powers and duties on the Crown and the SOE. For most purposes in this part these are treated as the ministers and directors respectively. As mentioned in Part III.A power in relation to SOEs can be characterised as concerning: management functions; monitoring functions; or more indirect regulatory functions. The SOEs Act provides the basis for most monitoring functions. The SCI rests on this basis though section 5 of the Act enhances its status. The rules may, *inter alia*, also enable some types of monitoring to be undertaken. The prime function of the rules is to allocate management power, with which the SOEs Act is (expressly) concerned only in broad, enabling terms.

As is clear from the paper so far, the structure of the SOEs legislative framework is complex. In relation to management, directors are given broad operational power by the Act but exercise it in accordance with the SCI.²¹¹ The Act says little expressly about what overseeing role ministers have in relation to management though it sets out the broad principles and objectives to govern the SOEs. The articles allocate most management power to directors, leaving the shareholding ministers with certain important residuary functions. The Act has a set of explicit monitoring provisions in the form of disclosure duties on the directors and ministerial powers to require disclosure. Ministers are conventionally and legislatively responsible to Parliament for the performance of their functions. Ministers are also responsible for matters that touch more indirectly on SOEs. Examples are responsibility for transparency negotiations and responsibility for regulatory control of an area. Overall, the competitive neutrality

²¹⁰ Though see H.S.E. Gravelle, "Judicial Review and Public Firms" (1983) 3 *International Review of Law and Economics* 187.

²¹¹ Section 5.

purpose is particularly evident from the Act, especially given sections 4 and 7. This structure is relevant to judicial review.

The functions, powers and duties conferred by the SOEs Act are detailed in Tables 9 and 10 for ministers and directors respectively. The articles were examined in Part III.C.

TABLE 9: STATUTORY DUTIES, POWERS AND FUNCTIONS OF THE CROWN AND SHAREHOLDING MINISTERS²¹²

<u>Section</u>	<u>Actor</u>	<u>Duty. Power. Function</u>
<u>Express</u>		
<i>Part I: Principles</i>		
s.5(1)	Ministers	The directors shall be persons, who in the opinion of those appointing them, will assist the SOE to achieve its principal objective.
s.6	Ministers	must be responsible to the House of Representatives for the performance of the functions given to them by the SOEs Act or SOE rules.
s.7	Crown	must agree with an SOE to pay it to provide goods and service if that is wished.
s.9	Crown	must not, by virtue of the SOEs Act, act in a manner inconsistent with the principles of the Treaty of Waitangi.
<i>Part II: Formation and Ownership of New State Enterprises</i>		
s.10	Ministers	may, on behalf of the Crown, acquire shares or equity bonds in the new SOEs (in equal shares) using money appropriated by Parliament for the purpose.
s.11	Ministers	must not dispose of shares or permit shares to be allotted to any other person.
s.13(1),(2)	Ministers	may: <ul style="list-style-type: none"> (a) direct a new SOE to include/omit certain provisions in/from its SCI; and (b) determine the dividend; but, in doing so, must: <ul style="list-style-type: none"> (a) have regard to Part I; and (b) consult the board.
s.13(3)	Minister	must lay before Parliament: notices of direction about SCI, dividend (s. 13(1)).
s.17(1)	Minister	must lay before Parliament the rules and changes to rules of SOEs.
s.17(2)	Minister	must lay before Parliament the SCI, annual report, audited financial statements, and auditor's report of an SOE.
s.17(3)	Minister	must lay before Parliament a modification (under s.14(4)) of an SCI.
s.17(4)	Minister	must lay before Parliament the half yearly report of an SOE.
s.22(3)	Minister	may exercise all the rights and powers attaching to SOE shares held by that Minister.

²¹² The table excludes those duties, powers and functions in Part IV of the SOEs Act 1986 that are not relevant to accountability.

TABLE 9 CTD: STATUTORY DUTIES, POWERS AND FUNCTIONS OF THE CROWN AND SHAREHOLDING MINISTERS

Implied:

Part III: Accountability

s.14(1)	Ministers	receive a draft SCI within one month of commencement of financial year (comprising certain provisions under 14(2).
s.14(3)	Ministers	comment on draft SCIs within 2 months of commencement of financial year; and receive completed SCI to ministers within 3 months of commencement of financial year.
s.14(4)	Ministers	receive a written proposal to modify an SCI by written notice and comment in 1 month.
s.15	Ministers	receive: annual report; audited financial statements; auditors' report; which must: contain such information as is necessary to enable informed assessment of the operations; and state the dividend payable.
s.16	Ministers	receive half yearly reports within 2 months after the end of the first half of the financial year.
s.18	Ministers	may request information relating to affairs of the SOE after consultation with the board (except for information on any identifiable individual).
s.19	Ministers	prescribe the rates of fees for the Audit Office as auditor; and approval the appointment of an additional auditor.

TABLE 10: STATUTORY DUTIES, POWERS AND FUNCTIONS OF DIRECTORS AND SOES²¹³

<u>Section</u>	<u>Actor</u>	<u>Duty, Power, Function</u>
<i>Part I: Principles</i>		
s.4	SOE	The principal objective shall be to operate as a successful business, and, to this end, to . . . (be profitable, a good employer and to exhibit a sense of social responsibility).
s.5(2)	Directors	must make, or authorise the making of all decisions relating to the operation of an SOE, in accordance with its SCI.
s.5(3)	Directors	must be accountable to the shareholding Ministers in the manner set out in Part III of the Act (ss. 14 - 20).
s.7	SOE	must agree with Crown to be paid it to provide goods and service if that is wished by the Crown.

Part II: Formation and Ownership of New State Enterprises

s.12	SOEs	may issue Equity bonds if authorised by resolution of the House of Representatives (on certain terms).
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²¹³ Supra n. 4.

TABLE 10 CTD: STATUTORY DUTIES, POWERS AND FUNCTIONS OF DIRECTORS AND SOES

s.13(1),(2)	Directors	must comply with a ministerial directions to: (a) direct a new SOE to include/omit certain provisions in/from its SCI; and (b) determine the dividend; but, in doing so, may: (b) be consulted by the ministers.
<i>Part III: Accountability</i>		
s.14(1)	Directors	must deliver to Ministers a draft SCI within one month of commencement of financial year (comprising certain provisions under 14(2)).
s.14(3)	Directors	must consider Ministers comments made within 2 months of commencement of financial year; and must deliver completed SCI to Ministers within 3 months of commencement of financial year.
s.14(4)	Directors	may modify an SCI by written notice to Ministers if made a written proposal and considered comments made in 1 month.
s.15	Directors	must deliver to Ministers: annual report; audited financial statements; auditors' report; which must: contain such information as is necessary to enable informed assessment of the operations; and state the dividend payable.
s.16	Directors	must deliver half yearly reports to Ministers within 2 months after the end of the first half of the financial year.
s.18	Directors	must supply to ministers such information relating to affairs of the SOE as is requested after consultation with the board (except for information on any identifiable individual).
s.19	SOE	must have the Audit Office as auditor, pay fees at rates prescribed by Minister; and may, after consultation with the Audit Office and with approval of Minister, appoint an additional auditor.
s.20	SOE	may withhold, from the SCI, annual report, financial statements and half yearly report, information that could properly be withheld under the Official Information Act 1982.

*(b) Application Procedure and Grounds**(i) Application Procedure*

This has a potentially wide application in the SOE context. All SOE actors are "persons": ministers, directors, the SOE. Even the Crown's prerogative may now be subject to judicial review. Actions under the authority of the SOEs Act, an SOE specific Act, the memorandum and articles may be reviewed if, broadly, they affect

others' interests. The memorandum and articles fall within one of "constitution . . . rules or bylaws of any body corporate". The SCI derives power from the SOEs Act and may be the basis of review under it. It is possible, though unlikely, that it may also fall within the definition itself, as part of the constitution. In addition of course, one of paragraphs (a) to (e) of the definition of "statutory power" must also be satisfied, which includes, in paragraph (b), a "statutory power of decision" - broadly, if someone's interests are affected. It should be noted that the Judicature Act could equally apply to ordinary companies' actions under their constitution or rules.

(i) Ultra vires

This is the most relevant ground of judicial review in relation to SOEs, as it is for ordinary companies. SOE actors must act within their powers and duties that derive from, most notably the SOEs Act and the articles of association, but also from the other SOE-specific Acts.

As seen in Part III.C, the grounds of ultra vires in relation to articles have been reduced with the lack of objectives and the statutorily implied powers. Those powers, however, and the allocation of management powers specific to the articles, must not be exceeded, and the duties must be fulfilled. Ultra vires thus provides for the enforcement of the articles and affects the incentives analysed in Part III.C accordingly.

Similarly, the SOEs Act powers and duties are enforceable. The procedural requirements of the monitoring provisions in Part III of the Act - on both the directors and ministers - thus require such reasonable compliance as may be expected in the circumstances. Breach of the timing requirements by a few days would probably incur no sanction, but if by six months review might succeed. Compliance with the substantive monitoring and management provisions in Parts II and III may be reviewed.

Review of Part I principles is subject to a limitation discussed later. In any case the broad nature of most of the principles makes review on the basis of ultra vires difficult. A court would be extremely hesitant to impose its view of the meaning of the section 4 objective in a particular situation. What Part I does do well is present the principles to govern the SOEs which may be used to inform review of actions done or decisions made under other parts of the Act or the articles. Sections 4 and 7 are particularly relevant in this regard. They may limit political interference by ministers in extreme circumstances. There are some aspects of Part I that are specific enough to be reviewed on the basis of ultra vires. Section 5(2) is significant, requiring directors'

operational decisions to be made in accordance with the SCI. The substance of SCIs means that this bestows an almost constitutional status on the SCIs, comparable to and wider than the objects clause in pre-1984 memoranda of association. The nature of the SCIs, as analysed in Part III.B, is also broad enough as to cause courts to hesitate in ruling a decision *ultra vires*, but it is possible. It is difficult to know how sections 6 or 7 could be legally enforced as they rest respectively on agreement and on constitutional convention. Section 5(1) is capable of enforcement though the subjective wording makes *ultra vires* more difficult to establish.

(ii) Other Grounds

Certain observations apply to the other grounds for review collectively. In considering those grounds in relation to an action or decision in the SOE context, a court will have regard to the principles in Part I, and especially the commercial nature of SOEs. Competitive neutrality is quite clear from the statute. It is sufficiently legislated that a court may well grant judicial review on this and the following grounds only where it would do so in relation to an ordinary company. This depends on all the factors analysed earlier but in this context, especially on the degree of public interest (in a policy sense) in the decision. For example, a pricing decision by Electricorp may, *ceteris paribus*, attract a greater likelihood of judicial review than that of Government Property Services.

It is probable, however, that those areas which are of significant public interest are also governed by the SOE specific legislation - almost by definition. A court would have regard to that. The consequence is that competitive neutrality in judicial review attaches to those aspects of SOE operation that are not governed by SOE specific legislation. For those aspects, that legislation is very relevant to a court's review in providing the statutory context of the decision and thus the requirements of the principles of judicial review.

Some aspects of the specific grounds of review are of note. Procedural fairness would probably be more use in an SOE context than the more judicial like principles of natural justice. It is most likely in relation to SOE management decisions but the requirements will depend on the individual decision under review.

The application to SOEs of the principles of abuse of discretion produce the following (extreme) examples. In determining the amount of an SOE dividend payable

under section 13(1)(b) the shareholding ministers must actually have regard to Part I of the Act under subsection (2). They may not have regard to the fact that the managing director has a new BMW. Under section 18, ministers may not request information from an SOE on the basis that information politically embarrassing to the opposition may be revealed. This would be an improper purpose. It would be unreasonable for a minister to authorise, under section 22(4), a business competitor of the SOE to act as the minister's representative at shareholder meetings. Most of these examples are extreme. The less extreme, the more room for doubt as to the outcome. It should be obvious, however, that a significant range of situations could be caught as abuse of discretion. If the procedures or motives feel wrong - especially if they feel political - it may be caught. It should be noted that lack of evidence is often a problem in relation to abuse of discretion.

Principles regarding the exercise of discretion are important in the SOE context in view of the central relationship between minister and director. Section 5(2) is relevant. There may be some decisions, of an executive management nature, that the directors could not legally delegate. Similarly, they must not be governed by either a strict self imposed policy or by ministerial dictation in the exercise of discretion. Note, though, that the last point is subject to ministers' legal powers as shareholders.²¹⁴

(c) *Limitations on Availability*

(i) Standing

Not just anyone can challenge the exercise of any of the powers or duties conferred in Tables 9 and 10. A person or group of persons who is directly affected by a decision might challenge it. For example, an SOE customer or contractor affected by a decision would probably have sufficient standing. A candidate for directorship who missed out on appointment might (*ceteris paribus*) challenge the compliance with the duty in section 5(2). A "grave enough" breach might be subject to challenge. For example a challenge could probably be mounted against a minister who purports to sell shares. Allied to this, a matter of great public importance could satisfy standing requirements.²¹⁵ For example, considerations such as this may lie beneath the unchallenged standing of the applicant in relation to the SOE context in *The New Zealand Maori Council v. Attorney-General*.²¹⁶

²¹⁴ Authority for this is found in section 6 combined with section 22(3) if it is necessary to point to a link with the legal powers of shareholders under the Companies Act 1955.

²¹⁵ *Finnigan* supra n. 207.

²¹⁶ (1987) 6 NZAR 353, especially Casey J. at 405.

(ii) Section 21 of the SOEs Act

Section 21 provides:

"A failure by a State enterprise to comply with any provision contained in Part I of this Act or in any statement of corporate intent shall not affect the validity or enforceability of any deed, agreement, right or obligation entered into, obtained, or incurred by a State enterprise or any subsidiary of a State enterprise."

This limits the application of judicial review. It prevents a remedy from being effective where it involves challenging the validity or enforceability of one of the items mentioned. The scope of this limitation, however, is itself limited. It applies to Part I or an SCI. It applies to non-compliance by an *SOE*, which involves sections 4, 7 and 8, but not by a minister, director, board or the Crown. Hence judicial review of actions or decisions under sections 5, 6, one side of 7, and 9 is not limited. Notably, the directors' duty of accordance with the SCI is not protected from judicial review, though rights and obligations etc entered into as a result of an unlawful exercise of the duty are not affected. Also, if practical, a remedy such as injunction could be sought in advance of, and preventing, the objectionable action giving rise to the right or obligation etc.

4. *Incentives*

What is the impact of Judicial Review on the incentives of actors in the SOE accountability process? It is simply to increase the costs of particular behaviour to particular actors in particular circumstances. Analysis of incentives mainly involves determining the content of these three factors. A brief such determination is presented here.

Generally, actions and decisions done or made on the basis of the SOEs Act, articles or other SOE-specific legislation are potentially reviewable. Most people connected with SOEs have sufficient standing to apply for judicial review.

Most management functions are allocated by the articles. The functions, powers and duties constituting that allocation, and those provisions of Part II of the SOEs Act that deal with management functions, are enforceable on the basis of the *ultra vires* ground of judicial review - procedural and substantive. The principles of Part I of the Act that lay the basis of management, such as sections 5 and 6, are not as susceptible to review for two reasons. Their broad nature inhibits consideration of their substantive

requirements. The section 5 requirement in relation to the SCI is more specific than other provisions but the content of the objectives part of SCIs are still broad enough to inhibit review. Also, section 21 affects the availability of a remedy implying invalidity, in the limited range of circumstances discussed above. Management decisions on the basis of the Act or the articles may also be subject to the requirements of other grounds of judicial review - those of procedural fairness, abuse of discretion and exercise of discretion. They are available to the same extent as they are in relation to ordinary companies, unless a significant public interest is present. The presence of SOE specific legislation is an important indicator of that and affects the requirements of these grounds.

Review is available in respect of monitoring functions in the same ways as it is for management functions. One difference is that most articles are not directly relevant. The monitoring provisions in the Act (in Part III) are more precisely specified in procedure substance and object than are the management functions. This allows more scope for review on the basis of both *ultra vires* and the other grounds. Section 21 is not relevant except to the extent that monitoring is implied in the broad functions of Part I.

What of the broader effect of incentives relating to judicial review? It is only relevant in some contexts. Where the immediately aggrieved party is Parliament, or a shareholding minister, a less costly means of enforcement is available than court action in most cases: political sanctions or shareholder action. Review merely remains a less attractive option. There is possibly some incentive for directors to use judicial review to enforce ministerial compliance with duty, or prevent ministerial abuse of discretion. There is more likelihood of interested third parties using judicial review to enforce Part III of the Act. Apart from political pressure, for which there may be procedural information costs or transaction costs, judicial review may, for third parties, be the most cost effective avenue. The problem would be standing, but those with the incentive to pursue judicial review should be able to satisfy this. A creditor, Equity bond holder or market analyst has a direct interest in the matter disclosed under part III. So does a business rival, but for reasons with which a court is likely to disapprove. Most tenuously, an interested member of the public could argue the objects of disclosure.

The effect of judicial review is also dependent on actors' perceptions of the likelihood of an action and of the level of cost or harm that would result. Some ministers, possibly, and most directors, probably, do not have much appreciation for the detailed scope of judicial review. There will be, however, some recognition of legal

need to adhere to the Act which actually provides a reasonable guide to potential actions. Sufficient notable applications for judicial review have been made in New Zealand that some expectation of an action for a serious breach should exist. A remedy would, generally, affect the continuance of the abuse or non compliance. The political costs of such an action could be significant for a minister. Reputation costs to directors may be lesser but still positive.

Judicial review can thus be expected to impose some cost on serious non compliance with, or abuse of, duties and powers in SOEs' articles, and in the SOEs Act (Parts II and III especially). The *New Zealand Maori Council*²¹⁷ case illustrates the potentially enormous implications of judicial review.

3. The Ombudsman

The Office of the Ombudsman, adopted from Scandinavia, provides an avenue of complaint against "unfair" decision-making in government.²¹⁸ It has been effective in doing so.²¹⁹ A major avenue open for an Ombudsman's consideration by complaint of an individual about an act, omission, decision or non-decision "resulting in a matter of administration and affecting any person... in his personal capacity" is or by certain Departments.²²⁰ The Ombudsman can, subject to certain restrictions, and with certain powers, investigate, report and make recommendations to the responsible, in minister, the Prime Minister or Parliament. Recommendations may be made if an Ombudsman is of the opinion that the decision or act was:²²¹ illegal, unreasonable,²²² unjust, oppressive, improperly discriminatory, based on mistake of fact, wrong²²³ in the sense of a decision based on irrelevant or irrelevant considerations or based on improper motives. It seems that in practice Ombudsmen are more concerned about the procedure involved in making decisions rather than the substance of a decision.²²⁴

²¹⁸ See generally the Ombudsman Act 1975; Annual Reports of the Ombudsman (1982) 12 V.U.W.L.J. 201 and 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

²¹⁹ Ibid. 226.

²²⁰ Section 15 Ombudsman Act 1975.

²²¹ Section 16(1) Ombudsman Act 1975.

²²² This is interpreted broadly by the Ombudsman G.A.S. Taylor "They Indeed Review Decisions a Broadly" in *Journal of Administrative Action in the 1980s: Problems and Prospects* ed. Michael Taylor, Oxford University Press and the Legal Research Foundation Inc., Auckland, 1989, 104, 112.

²¹⁷ *The New Zealand Maori Council v. Attorney-General* (1987) 6 NZAR 353.

E. OTHER ELEMENTS

A potential strength or weakness in examining an accountability structure as the product of influences is a tendency to try to take account of all influences. This paper focusses on four significant elements of SOEs' accountability structure that derive from the core elements of government and private law: ministerial responsibility; Parliamentary scrutiny; company law; and judicial review. It is their confluence that seems to result in the essentials of the accountability structure of SOEs. There are, of course, other significant elements. The paper will not examine them all in detail, but here briefly presents an outline of some of the more interesting. This enables the structural framework of SOEs' accountability to be placed in a context of other influences.

1. *The Ombudsman*

The Office of Ombudsman, adapted from Scandinavia, provides an avenue of complaint against "unfair" decision making in government.²¹⁸ It has been effective in doing so.²¹⁹ A matter usually arises for an Ombudsman's consideration by complaint of an individual about an act, omission, decision or recommendation "relating to a matter of administration and affecting any person . . . in his personal capacity" in or by certain Departments.²²⁰ The Ombudsman may, subject to certain restrictions, and with certain powers, investigate, report and make recommendations to the organisation, its minister, the Prime Minister or Parliament. Recommendations may be made if an Ombudsman is of the opinion that the decision etc was:²²¹ illegal; unreasonable;²²² unjust; oppressive; improperly discriminatory; based on mistake of fact; wrong;²²³ in the case of a discretion, based on relevant or irrelevant considerations or lacked adequate reasons. It seems that in practice Ombudsmen are most concerned about the procedure involved in making decisions rather than the substance of a decision.²²⁴

²¹⁸ See generally: the Ombudsmen Act 1975; Annual Reports of the Ombudsman; (1982) 12 V.U.W.L.R and also J.L. Robson, *Sacred Cows and Rogue Elephants: Policy Development in the New Zealand Justice Department*, (Government Printing Office, Wellington, 1987) pp. 217-236.

²¹⁹ Ibid 236.

²²⁰ Section 13 Ombudsmen Act 1975.

²²¹ Section 22(1), (2) Ombudsmen Act 1975.

²²² This is interpreted broadly by the Ombudsman: G.D.S. Taylor "May Judicial Review Become a Backwater?" in *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* ed. Michael Taggart, (Oxford University Press and the Legal Research Foundation Inc., Auckland, 1986) 152, 173.

²²³ Idem.

²²⁴ Annual Report of the Ombudsmen, 1978.

The Ombudsmen's jurisdiction includes new SOEs²²⁵ though section 31 of the SOEs Act provides that the jurisdiction should be reviewed by a select committee reporting to the House of Representatives by 1 April 1990. There is few special consequences deriving from the form of organisation of SOEs. For instance, there seems no doubt now that a court would hold that the phrase "matter of administration" is perfectly applicable to SOEs.²²⁶ It must be important, however, that the explicit function of SOEs is to "operate as a successful business". Again, sections 4 and 7 are important. It would seem reasonable that the Ombudsmen should develop a "standard" against which to assess SOE behaviour that takes this into account. Potential competition will be relevant to the behaviour of SOEs - which suggests that there may be different considerations relevant to different SOEs. The discretion of the Ombudsmen will be significant in determining the treatment of SOEs. The review provided for may affect their incentives in such a determination. It is too early to assess the application of the Ombudsmen's jurisdiction to SOEs in practice.

The incentives affected by the application of the Ombudsmen Act will be mainly those of the directors.. The perceived cost of possible consequences in terms of reputation and possible disclosure of information is likely to be significant. This will particularly involve decision making procedures. The incentive will be to institute systems of management that avoid such costs to the extent that there is net benefit in doing so. The degree of public knowledge, and SOE appreciation, of this form of remedy compared to that of judicial review suggests that, possibly in relation to the same broad types of behaviour, the Ombudsmen will have a reinforcing if not greater effect.

2. *The Official Information Act 1982*

The Official Information Act replaced an emphasis on secrecy of official information with an emphasis on freedom of access. As noted already in relation to Parliamentary disclosure and disclosure under the Companies Act information is vital to monitoring, scrutiny, criticism - accountability. Indeed section 4(a)(ii) explicitly states that a purpose of the Act is "to promote the accountability of Ministers of the Crown and officials". It applied to the pre-SOE government departments and now applies to SOEs,²²⁷ subject to a review on the same terms as that of the Ombudsmen's jurisdiction under section 31 of the SOEs Act.

²²⁵ Under the Third Schedule of the SOEs Act.

²²⁶ *Re British Columbia Development Corporation* (1984) 14 D.L.R. (4th) 129 (S.C.C).

²²⁷ Under the Third Schedule of the SOEs Act, and now section 23(1) of the Official Information Amendment Act 1987.

The regime instituted by this Act is complex and has been overhauled by the Official Information Amendment Act 1987.²²⁸ The prime principle is that information is to be made available. The Act provides procedures for:

- (i) applying for the release of official information;
- (ii) the duties of those holding the information;
- (iii) the criteria for release;
- (iv) the reasons for refusal of release;
- (v) the mode of release;
- (vi) time limits for release;
- (vii) complaints about non release to the Ombudsmen; and
- (viii) ultimate decisions for release by Cabinet subject to judicial review.

The criteria most relevant to SOEs are now in section 9(2) paragraphs (b) and especially (i) and (j): if and only if the withholding of the information is necessary to:

- (b) Protect information where the making available of the information -
 - (i) would disclose a trade secret;
 - (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information;
- (i) enable . . any organisation holding the information to carry out, without prejudice or disadvantage, commercial activities;
- (j) enable . . any organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial or industrial negotiations).

Unless there are outweighing public interest considerations these are good reasons for withholding official information. The incentives emanate from the disclosure of information under the Official Information Act are thus unlikely to operate in respect of commercial information. They will operate in respect to other information about the operation of SOEs.

3. "The Crown"

The Crown's legal status is *sui generis*.²²⁹ It is immune from some general legal principles. It is sometimes excepted from the operation of specific provisions of legislation. There is even a general rule that legislation shall not bind the Crown

²²⁸ For a recent account see Palmer, *supra* n.2, Ch.16.

²²⁹ See generally Peter W. Hogg, *Liability of the Crown: in Australia, New Zealand and the United Kingdom* (The Law Book Co. Ltd., Sydney, 1971), especially chapter 8.

"unless it is expressly stated therein that Her Majesty shall be bound thereby".²³⁰ Examples of areas where crown status may make a difference include: liability for rates or taxes; priority in windings up; limitation periods; enforceability of contracts; discovery; and injunctions and other remedies. In addition certain sections of the SOEs Act is relevant here. Section 9 restricts acts by the Crown that are inconsistent with the Treaty of Waitangi. It may often be important to determine whether a corporation or company owned by the Crown is similarly excepted. "The legal issue is whether the nature of the relationship between the corporation and the crown entitles the corporation to the particular Crown attribute which is claimed."

It is unlikely that any attributes of Crown status adhere to SOEs in many contexts. Section 4 of the SOEs Act makes it clear that the Crown owns the SOEs.²³¹ The clear intention, indeed the whole purpose, of the SOEs Act is to separate SOEs from the Crown. This is explicitly recognised in several provisions of the SOEs Act. In section 2 "Crown" is defined as her Majesty the Queen in right of New Zealand". Section 7 provides that transparent non-commercial activities are to be negotiated between the SOE and the Crown. Section 23 regulates the transfer of Crown assets and liabilities to SOEs. Few situations can be imagined where such clear legislative intent will be overridden. Certainly the nature of the functions of the SOE are not determinative.²³² Generally a control test is applied to the particular function in issue.²³³

The most likely situation where the possibility of Crown status arises is where an SOE is performing a peculiarly Crown function according to a section 7 agreement. In this circumstance the SOE will be the agent of the Crown. Administration of the electoral system by New Zealand Post is probably an example. This does not seem to violate the principle of competitive neutrality since a private company could be in the same position and therefore have the same status. It is not dependent on status as an SOE. The point is that the incentives facing an SOE (directors specifically) will be different in relation to section 7 behaviour than commercial behaviour.

²³⁰ Section 5(k) of the Acts Interpretation Act 1924.

²³¹ Through the shareholding ministers per s. 10.

²³² Hogg *supra* n. 229, 210.

²³³ *Ibid.*, 211. The "In Consimili Casu" cases of the nineteenth century appear to be confined to their facts and era. *Ibid* 213.

IV. THE ACCOUNTABILITY PROCESS

Part IV brings together the elements of the accountability structure analysed in Part III and the analysis in Part II of motive incentives in the political and commercial spheres of activity. This illuminates the overall picture of the operation of the SOE accountability process and clarifies certain policy implications for the SOE reforms.

The starting point of incentive analysis is the motive incentives. In Part II these were analysed as political power and financial profit. They represent basic aims of human endeavour relevant to SOEs. They are the subjects of activity in the political and commercial marketplaces respectively. The electorate desires the implementation of and adherence to social decisions and shareholders desire profit. In each sphere transaction costs induce the formation of organisations by the electorate and by shareholders: governments and companies. As principals they delegate the management of the organisational activity - the exercise of political and commercial decisionmaking - to agents: boards of directors, and governing parties. There are agency costs inherent in each delegation. These are controlled by mechanisms that channel the incentives of the actors involved so as to align principals' and agents' interests. A framework of such mechanisms is an accountability structure.

The SOE exists at the confluence of the political and commercial spheres. By definition it has trading functions and operates in the world of commerce. It is also owned by the government and may be used to achieve government purposes. Prior to the latest reforms the new SOEs were organised along departmental lines that were designed to serve political functions. The reforms represent a recognition that the commercial aspect of SOEs was not adequately catered for by an accountability structure aimed at political goals. The decision was to create a structure to meet the profit and efficiency demands of commercial goals. Public and private, or political and commercial, accountability structures have been melded to produce a unique mix of mechanisms affecting the incentives of SOE actors. This paper has examined the working of the more fundamental of those mechanisms.

Ministerial responsibility is a monitoring mechanism that helps to align the incentives of ministers with those of Parliament and the electorate at large. It amplifies the effect of ministers' political incentives with respect to those functions for which ministers are responsible. The SOE reforms have deliberately aimed to confine the extent of ministerial responsibility to broad policy and directional decisions. This is achieved through the articles of association and the shareholder monitoring regime. Yet these means are subject to low cost change by political decision, as influenced by

the political "success" of the present arrangements. The solidity of this element of the reforms is questionable. Thus the political climate directly determines not only the behaviour of ministers in relation to the broad direction of SOEs. But it also determines the degree of that broadness; which may not be very broad at all.

Parliamentary scrutiny is specifically linked to ministerial responsibility in that it provides the procedure for requiring answerability. This is achieved through debates and select committees, but most particularly through questions. In addition, the new select committee powers are available for direct Parliamentary scrutiny of directors. The scope for debates and the effective answering of questions by SOEs themselves are also avenues for direct scrutiny. More generally, the mechanisms of Parliamentary scrutiny determine the effectiveness of Parliament as a monitor of government, particularly of ministers. They thus directly affect ministers' perceptions of the seriousness of the political costs of various actions and the extent to which the costs are discounted by the likelihood of non disclosure. They also affect directors' incentives to the extent that political controversy or disclosure is costly to them.

Contrary to the conventional constitutional wisdom economic analysis indicates that Parliamentary scrutiny can be an effective institution for accountability; in affecting incentives. Certainly this accords with political actors' own beliefs. The efficacy derives from the unpredictability of the Parliamentary arena and potential for disclosure and criticism of any action. It is further reinforced by the mixed nature of the mechanisms for scrutiny. Questions provide a sharp focus of attack. Debates allow sustained criticism. Select committees encourage more detailed analysis of bipartisan issues. Parliamentary scrutiny is more suited to debate of broad or fundamental principles and issues because higher political stakes are involved. This provides a justification for confining ministerial responsibility to the broad directional issues of SOE. Again, of course, the political climate influences the substantive incentives of what to monitor from what angle. The study of those incentives is the subject of political science.

Ministerial responsibility and Parliamentary scrutiny are both part of the conventional system of political decisionmaking. They are still part of SOE decisionmaking though ministerial responsibility is currently narrowed to exclude management decisions. The new part of the accountability structure is company law and behaviour.

Ordinary companies are established by shareholders to make a profit. They are therefore the obvious model to address efficiency problems in SOEs. Economic analysis reveals when the company structure is applied to SOEs inherent limitations on efficiency incentives are created. First some efficiency incentives are absent from SOEs due to the non-transferability of control. Takeovers may not occur. Second, and more subtly, agency cost analysis emphasises that efficiency incentives ultimately derive from the shareholder's aims: profit. SOE shareholders' aims depend on political incentives. They are not necessarily profit and only profit. Consequently, those mechanisms of the market and of company law which economise on pure agency costs, rather than promote the ordinarily assumed goal of profit, may not be effective in inducing efficiency.

There are still efficiency influences to be gained from using the company structure. Psychologically, the change to a corporate structure may induce a change of behaviour patterns amongst employees, directors and other actors. The political selling of the reform as efficient has reinforced any such effect. And most of the legal principles and characteristics of companies are geared to profit, assuming that to be the aim of the agency relationship. The rules regulating directors' interests and specific types of behaviour in relation to the use and distribution of company assets and funds are examples, though it is true that some of these may be waived by shareholder resolution. The ability to issue debt and non-voting equity securities maintains some market pressure on profitable performance by inducing financial analysis of management performance. Importantly too, directors appointed from the commercial sector have an incentive to maintain their reputation as managers. The articles of association have been drafted to allocate management power to directors. Though the articles could be changed this has at least constructed a barrier to casual shareholder interference. The shape of the shareholder monitoring regime is also relevant. To encourage efficiency it should not encourage *ex ante* ministerial involvement.

The general influence of company law, then, is to encourage efficiency. Certainly it is much more geared to efficiency than the departmental structure. But efficiency is not encouraged to the extent that it is in ordinary companies. In the company structure shareholding ministers are inherently able to affect the commercial operation of an SOE. The extent and direction of their effect is dependent on the operation of political incentives on the mechanisms of ministerial responsibility and parliamentary scrutiny. At present the political climate encourages efficient management and non-interference by ministers. A change in New Zealand politics

comparable to that in 1984 could dramatically change the relationship between ministers and SOEs.

Judicial review is a more passive element of the SOE accountability structure. It reinforces the policy of the SOE reform by emphasising the SOEs Act. Certain behaviour is discouraged by costs being attached to it. Specifically, judicial review discourages the exercise of management powers other than in the way they are set out by the articles and the SOEs Act. It enforces the allocation of management power under the articles. It also reinforces the efficiency incentives of company law by having regard to the clear commercial objective in the SOEs Act apparent from sections 4 and 7. The exercise of shareholder powers inconsistently with this may, in extreme circumstances, be reviewed. A significant limitation on the effect of judicial review is the degree to which its likelihood is discounted by the availability of alternative courses of action and by ignorance of its potential. The Ombudsmen's effect is probably similar to that of judicial review without the authority of binding legal sanction but with greater likelihood of action.

The availability of information is important in influencing the actions of directors, ministers, Parliament, the market and the courts - in fact all actors in the SOE accountability process. Information lies at the heart of accountability. Yet information itself is costly and is guarded jealously in the commercial arena. Disclosure under the SOEs Act, Companies Act and market pressure seems to result in some useful broad characterisations of activities and financial statements. Due to the Auditor-General's incentives reasonably thorough and frank auditing can be expected. Yet the dominant characteristic of disclosure regimes is the leaving of discretion in the person of whom disclosure is required. This is controlled to a large extent by the Official Information regime under which significant but mainly non-commercial information is available. Apart from this the interplay of incentives is relevant to determine the degree of disclosure. It is ironic that disclosure of information is both basic to the operation of SOE actors' incentives and dependent on them. This may be an inherent problem.

The overall operation of the accountability process of SOEs is a function of two conflicting sets of mechanisms: those of the political and the commercial worlds. The balance is weighted in favour of the political sphere. All the mechanisms of political control apply to SOEs: ministerial responsibility; Parliamentary scrutiny; judicial review by the courts; the Ombudsmen; the Official Information Act. These influences

surround the company structure and principles of company law and behaviour that govern it. Neither set of mechanisms is unadulterated. The political accountability mechanisms must take into account the fundamental commercial nature of the new SOEs. Some of the incentives of company law for efficient behaviour are altered or removed.

In the present political environment it seems that much management discretion will be left to SOE directors. The articles of association and likely shareholder monitoring regime are evidence of that. Yet it remains true that political incentives may dominate the operation of SOEs. The extent of ministerial responsibility and hence Parliamentary scrutiny depend on an act of political will to refrain from instituting a close shareholder connection with management matters. A change in the political climate could reverse that.

V. CONCLUSIONS

This paper has analysed the accountability process of SOEs by focussing on the incentives of the actors involved as modified by the mechanisms of the accountability structure. On the basis of the analysis policy conclusions are drawn regarding the SOE experiment and methodological conclusions are drawn regarding the value of the economic approach.

The adequacy of an accountability structure of any organisation must be judged against the goals which the organisation is to meet. The company structure encourages "efficient" behaviour. Its legal and market accountability mechanisms influence directors to meet the profit motivated concerns of shareholders. The company is a viable way of organising commercial behaviour, at least relative to the other mechanisms examined. This suggests that if efficiency is the sole aim of an organisation it should be structured along company lines.

The departmental structure, in the context of the political system, facilitates the achievement of political goals. Goals that can be achieved by the exercise of power, and the supposedly subsidiary goal of staying in power, provide the motive incentives. Full ministerial control over a department is monitored by responsibility to Parliament, mechanisms of Parliamentary scrutiny and the political process as a whole. If the aims of an organisation are solely political (socially desired) this structure has advantages over the mechanisms considered.

An organisation that is owned by government but which operates in the commercial marketplace is a hybrid animal. Efficiency must constitute one of its goals. If there are no others it should be privatised along full commercial lines. If there are other goals then a composite structure must be developed that utilises elements of both political and commercial decision-making structures. These conclusions of the paper justify the current political consideration of both corporatisation and privatisation of elements of the state sector. An explanation of why that political consideration is occurring rests with the goals of current political actors and on the current political climate. The economic approach also has implications for the method of deciding whether an organisation has social goals. It is a political decision and should be made in the political marketplace. The actors in the political marketplace face incentives that lead them to behave "efficiently" in political terms.

Once it is decided that both social goals and efficiency are desired a more specific policy issue is raised. Is the SOE mix of political and commercial accountability mechanisms, as described in the paper, appropriate? As analysed in Part IV the mix is weighted, in the medium term, towards consideration of political incentives. Commercial incentives are present in the law and market behaviour of the company structure. Political incentives exist in the form of ministerial responsibility, Parliamentary scrutiny, the Ombudsmen and the official information regime. Yet political incentives also affect the operation of the commercial structure. Because the SOEs Act is consistent with a range of shareholder - director relationships, and there is a relatively low cost to changing the articles and shareholding monitoring regime, the closeness of relationship depends on political incentives. Political incentives themselves determine whether political incentives become important! This suggests that there is some need to further entrench efficiency incentives in the SOE accountability structure.

There is no point in removing all political influence because it is the political marketplace in which the achievement of the political goals is monitored and assessed. Ministers face the appropriate incentives to attain those goals, at least within the confines of the present political system. Certain methods of attaining a more balanced mix suggest themselves. Further checks should be imposed on the procedure for shareholding ministers in changing the articles of association. Alternatively the current policy of a management/monitoring split between directors and ministers might be given greater legislative recognition in the SOEs Act. A non-interventionist *ex post* shareholder monitoring regime should be instituted. Equity bonds should be issued. The application of the Official Information Act and the jurisdiction of the Ombudsmen Act should be restricted to the information that relate to the public interest element of SOEs. Lessened political influences would continue to exist in the face of these changes. Residual shareholder control of important management issues would continue. Shareholder monitoring of performance would continue. Policy goals can then be achieved by use of the section 7 transparency procedure.

In the longer term the strongest incentive for retention of a structure that produces efficient and socially desired results is that very commercial and political success of the structure. Success raises the political costs of change.

The broader conclusion of the paper concerns the methodology used: the economic approach. As explained in Part II, the economic approach is a method of thinking about human behaviour. It perceives behaviour to be driven by particular motive incentives and to take into account perceived costs and benefits - in the broad sense of difficulties and advantages. It is therefore applicable to a wide range of situations that may have little to do with finance or the economy. It offers to the lawyer a fresh perspective on familiar concepts. For example the analysis of Parliament on the basis of incentives reveals an efficacy in the scrutiny mechanisms beyond that criticised by conventional analysis. It may be that the same insights could be gained in other ways but they are emphasised naturally by the economic approach.

In the paper the economic approach has been applied to concepts such ministerial responsibility, parliamentary sovereignty and principles of company law and judicial review. It has been used to characterise the overall nature of the political and commercial spheres of activity and to analyse the role of actors within those systems. Analysis of the interaction of actors on the basis of incentives modified by accountability mechanisms clarifies the specific operation of those mechanisms. It also allows the formulation of a picture of the broad operation of SOEs. The paper returns frequently to the simple but key concept of agency. Economics recognises an agency relationship as a response to transaction costs. The recognition of agency costs in the organisational response leads to an analysis of mechanisms for economising on agency costs. A framework of thinking about accountability structures results. It is simple but yields valuable insights.

In the end the policy conclusions of this paper derive from a judgement of the influences explained by the economic approach. The value of the approach is the clarity it can give to an explanation of the influences involved. To be able to change something it is first necessary to understand how it operates. Thus in this wider methodological aspect the paper is presented as an example of how the economic approach can be valuable in analysing complex and fundamental policy issues.

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An Act to promote improved performance in respect of Government trading activities and, to this end, to—

(a) Specify principles governing the operation of State enterprises; and

- (b) Authorise the formation of companies to carry on certain Government activities and control the ownership thereof; and
 - (c) Establish requirements about the accountability of State enterprises, and the responsibility of Ministers
- [18 December 1986]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement—(1) This Act may be cited as the State-Owned Enterprises Act 1986.

(2) Sections 32 (1) and 33 of, and the Third, Fifth, and Sixth Schedules to, this Act shall come into force on the 1st day of April 1987.

(3) Subject to subsection (2) of this section, this Act shall come into force on the day after the date on which it receives the Governor-General's assent.

2. Interpretation—In this Act, unless the context otherwise requires,—

“Board” means—

(a) In relation to a State enterprise that is a company, the board of directors of the State enterprise;

(b) In relation to a State enterprise that is not a company, the persons occupying the positions in or in relation to the State enterprise that are comparable with those of the board of directors of a company;

“Company” means a company formed and registered under the Companies Act 1955, or an existing company within the meaning of that Act;

“Crown” means Her Majesty the Queen in right of New Zealand;

“Minister” means a Minister of the Crown;

“Organisation” includes a company, a body corporate, a partnership, and a joint venture;

“Responsible Minister”, in relation to a State enterprise, means the Minister for the time being responsible for that State enterprise;

“Rules” means—

(a) In relation to a State enterprise that is a company, the memorandum of association and articles of association of the State enterprise;

(b) In relation to a State enterprise that is not a company, the documents relating to the State enterprise that are comparable to the memorandum of association and articles of association of a company;

“Share” means—

(a) In relation to a company that has a share capital, a share in that capital of any class;

(b) In relation to an organisation (other than a company) that has a capital, an interest in or right to the whole or any part of that capital, other than an interest or right as a creditor;

(c) In relation to a company or other organisation that does not have a capital,—

(i) An interest in or right to any part of the assets of the company or organisation, other than an interest or right as a creditor; or

(ii) Where there are no assets, a direct or contingent obligation to contribute money to or bear losses of the company or organisation;—

and “shareholder” has a corresponding meaning;

“Shareholding Ministers” means the Minister of Finance and the responsible Minister;

“State enterprise” means an organisation that is named in the First Schedule to this Act;

“Statement of corporate intent”, in relation to a State enterprise, means the current statement of corporate intent for the State enterprise prepared pursuant to section 14 of this Act;

“Subsidiary” has the same meaning as in section 158 of the Companies Act 1955.

3. Act to bind the Crown—This Act shall bind the Crown.

PART I

PRINCIPLES

4. Principal objective to be successful business—(1) The principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be—

- (a) As profitable and efficient as comparable businesses that are not owned by the Crown; and
- (b) A good employer; and
- (c) An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.

(2) For the purposes of this section, a "good employer" is an employer who operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring—

- (a) Good and safe working conditions; and
- (b) An equal opportunities employment programme; and
- (c) The impartial selection of suitably qualified persons for appointment; and
- (d) Opportunities for the enhancement of the abilities of individual employees.

5. Directors and their role—(1) The directors of a State enterprise shall be persons who, in the opinion of those appointing them, will assist the State enterprise to achieve its principal objective.

(2) All decisions relating to the operation of a State enterprise shall be made by or pursuant to the authority of the board of the State enterprise in accordance with its statement of corporate intent.

(3) The board of a State enterprise shall be accountable to the shareholding Ministers in the manner set out in Part III of this Act and in the rules of the State enterprise.

6. Responsibility of Ministers—The shareholding Ministers of a State enterprise shall be responsible to the House of Representatives for the performance of the functions given to them by this Act or the rules of the State enterprise.

7. Non-commercial activities—Where the Crown wishes a State enterprise to provide goods or services to any persons,

the Crown and the State enterprise shall enter into an agreement under which the State enterprise will provide the goods or services in return for the payment by the Crown of the whole or part of the price thereof.

8. Industrial relations and personnel—Every State enterprise named in the Second Schedule to this Act shall comply with those provisions of the State Services Conditions of Employment Act 1977 that apply to it.

9. Treaty of Waitangi—Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

PART II

FORMATION AND OWNERSHIP OF NEW STATE ENTERPRISES

10. Ministers may hold shares in new State enterprises—(1) The Minister of Finance and the responsible Minister may from time to time, on behalf of the Crown, subscribe for or otherwise acquire all the shares in the companies named, or to be formed with the names specified, in the Second Schedule to this Act.

(2) The number of shares in a company held by each shareholding Minister pursuant to subsection (1) of this section shall be the same.

(3) Any money required to be paid by a shareholding Minister on subscribing or applying for, or being allotted, shares pursuant to subsection (1) of this section shall be paid out of money appropriated by Parliament for the purpose.

11. Ministers to hold all shares in new State enterprises—(1) No Minister who is a shareholder in a company named in the Second Schedule to this Act shall—

- (a) Sell or otherwise dispose of any shares in the company held in the Minister's name; or
- (b) Permit shares in the company to be allotted to any person other than a shareholding Minister.

(2) Nothing in subsection (1) of this section shall apply to redeemable preference shares that—

- (a) Are not convertible into shares of any other class; and
- (b) Do not confer any rights to vote at any general meeting of the company.

12. State enterprise equity bonds—(1) Notwithstanding section 11 of this Act or any other enactment, a company

named in the Second Schedule to this Act may issue State enterprise equity bonds to any person or persons in accordance with subsection (2) of this section, if authorised to do so at any time or times by resolution of the House of Representatives.

(2) The terms of issue of State enterprise equity bonds shall be as follows:

- (a) The bonds shall not confer any rights to vote at general meetings of shareholders;
- (b) The bonds shall be transferable in the manner provided by the rules;
- (c) For the purposes of the Companies Act 1955 and the Securities Act 1978 the bonds shall be deemed to be ordinary shares, and the holder of any bonds shall be deemed to be a shareholder;
- (d) For the purposes of the Income Tax Act 1976—
 - (i) The bonds shall be deemed to be ordinary shares and the holder of any bonds shall be deemed to be a shareholder;
 - (ii) Every sum distributed by a company named in the Second Schedule to this Act in any manner and under any name to a holder of bonds shall be deemed to be a "dividend" for the purposes of section 4 (1) of the Income Tax Act 1976;
 - (iii) No deduction shall be allowed to such a company for any such distribution;
- (e) Such other terms as are specified in the authorising resolution.

13. Powers of shareholding Ministers in respect of new State enterprises—(1) Notwithstanding any other provision of this Act or the rules of any company,—

- (a) The shareholding Ministers may from time to time, by written notice to the board, direct the board of a company named in the Second Schedule to this Act to include in, or omit from, a statement of corporate intent for that company any provision or provisions of a kind referred to in paragraphs (a) to (h) of section 14 (2) of this Act; and
- (b) The shareholding Ministers may, by written notice to the board, determine the amount of dividend payable by any company named in the Second Schedule to this Act in respect of any financial year or years,—

and any board to whom such a notice is given shall comply with the notice.

(2) Before giving any notice under this section, the shareholding Ministers shall—

- (a) Have regard to Part I of this Act; and
- (b) Consult the board concerned as to the matters to be referred to in the notice.

(3) Within 12 sitting days after a notice is given to a board pursuant to this section, the responsible Minister for the company concerned shall lay a copy of the notice before the House of Representatives.

PART III

ACCOUNTABILITY

14. Statement of corporate intent—(1) The board of every State enterprise shall deliver to the shareholding Ministers a draft statement of corporate intent not later than 1 month after the commencement of each financial year of the State enterprise.

(2) Each statement of corporate intent shall specify for the group comprising the State enterprise and its subsidiaries (if any), and in respect of the financial year in which it is delivered and each of the immediately following 2 financial years, the following information:

- (a) The objectives of the group;
- (b) The nature and scope of the activities to be undertaken;
- (c) The ratio of consolidated shareholders' funds to total assets, and definitions of those terms;
- (d) The accounting policies;
- (e) The performance targets and other measures by which the performance of the group may be judged in relation to its objectives;
- (f) An estimate of the amount or proportion of accumulated profits and capital reserves that is intended to be distributed to the Crown;
- (g) The kind of information to be provided to the shareholding Ministers by the State enterprise during the course of those financial years, including the information to be included in each half-yearly report;
- (h) The procedures to be followed before any member of the group subscribes for, purchases, or otherwise acquires shares in any company or other organisation;
- (i) Any activities for which the board seeks compensation from the Crown (whether or not the Crown has agreed to provide such compensation):

(j) The board's estimate of the commercial value of the Crown's investment in the group and the manner in which, and the times at which, this value is to be reassessed:

(k) Such other matters as are agreed by the shareholding Ministers and the board.

(3) The board shall consider any comments on the draft statement of corporate intent that are made to it within 2 months of the commencement of the financial year by the shareholding Ministers, and shall deliver the completed statement of corporate intent to the shareholding Ministers within 3 months of the commencement of the financial year.

(4) A statement of corporate intent for a State enterprise may be modified at any time by written notice from the board to the shareholding Ministers, so long as the board has first given written notice to the shareholding Ministers of the proposed modification and considered any comments made thereon by the shareholding Ministers within 1 month of the date on which that notice was given.

15. Annual report, accounts, and dividend—(1) Within 3 months after the end of each financial year of a State enterprise, the board of the State enterprise shall deliver to the shareholding Ministers—

(a) A report of the operations of the State enterprise and those of its subsidiaries during that financial year; and

(b) Audited consolidated financial statements for that financial year consisting of statements of financial position, profit and loss, changes in financial position, and such other statements as may be necessary to show the financial position of the State enterprise and its subsidiaries and the financial results of their operations during that financial year; and

(c) The auditor's report on those financial statements.

(2) Every report under subsection (1) (a) of this section shall—

(a) Contain such information as is necessary to enable an informed assessment of the operations of the State enterprise and its subsidiaries, including a comparison of the performance of the State enterprise and subsidiaries with the relevant statement of corporate intent; and

(b) State the dividend payable to the Crown by the State enterprise for the financial year to which the report relates.

16. Half-yearly reports—(1) Within 2 months after the end of the first half of each financial year of a State enterprise, the board of the State enterprise shall deliver to the shareholding Ministers a report of its operations during that half-year.

(2) Each report required by this section shall include the information required by the statement of corporate intent to be included therein.

17. Information to be laid before House of Representatives—(1) The responsible Minister for a State enterprise shall lay before the House of Representatives the rules of the State enterprise, and any change to those rules, within 12 sitting days after the date of those rules or that change or the date on which the State enterprise became such, whichever is the later.

(2) Within 12 sitting days of receiving all the following documents in respect of a financial year of a State enterprise, the responsible Minister for the State enterprise shall lay the documents before the House of Representatives:

(a) The statement of corporate intent of the State enterprise for that year and the succeeding 2 years; and

(b) The annual report and audited financial statements of the State enterprise for the preceding financial year; and

(c) The auditor's report on those financial statements.

(3) Where a statement of corporate intent for a State enterprise has been modified pursuant to section 14 (4) of this Act, the responsible Minister shall lay before the House of Representatives a copy of the notice making the modification within 12 sitting days after the date on which the Minister receives the notice.

(4) Within 12 sitting days after a half-yearly report is given to a responsible Minister pursuant to section 16 of this Act, the responsible Minister shall lay a copy of the report before the House of Representatives.

18. Other information—(1) Subject to subsection (2) of this section, the board of a State enterprise shall supply to the shareholding Ministers such information relating to the affairs of the State enterprise as the Minister of Finance or the responsible Minister from time to time requests after

consultation with the board (whether or not the information is of a kind referred to in the statement of corporate intent).

(2) The board of a State enterprise shall not be obliged by subsection (1) of this section to supply to any Minister any information on an individual employee or customer of the State enterprise or any other person if the information supplied would enable the identification of the person concerned.

19. Audit Office to be auditor of State enterprises and subsidiaries—(1) Notwithstanding sections 163 to 165 of the Companies Act 1955, the Audit Office shall be the auditor of every State enterprise, and of every subsidiary of every such State enterprise, and for the purposes of that Act shall have and may exercise the functions, duties, and powers of an auditor appointed under that Act and all such powers as it has under the Public Finance Act 1977 in respect of public money and public stores.

(2) Every State enterprise shall pay to the Audit Office for carrying out its duties and functions under this section fees at such rates as may be prescribed by the Minister of Finance.

(3) Without limiting the foregoing provisions of this section, the board of a State enterprise may, after consultation with the Audit Office and if its responsible Minister so approves, appoint a person or firm that is qualified for appointment as an auditor of a company to be an additional auditor of the State enterprise or any subsidiary thereof.

20. Protection from disclosure of sensitive information—Nothing in this Act shall be construed as requiring the inclusion in any statement of corporate intent, annual report, financial statements, or half-yearly report referred to in sections 14 to 16 of this Act of any information that could be properly withheld if a request for that information were made under the Official Information Act 1982.

PART IV

MISCELLANEOUS PROVISIONS

21. Saving of certain transactions—A failure by a State enterprise to comply with any provision contained in Part I of this Act or in any statement of corporate intent shall not affect the validity or enforceability of any deed, agreement, right, or

obligation entered into, obtained, or incurred by a State enterprise or any subsidiary of a State enterprise.

22. Provisions relating to Ministers' shareholding—

(1) Shares in a State enterprise held in the name of a person described as the Minister of Finance or the responsible Minister shall be held by the person for the time being holding the office of Minister of Finance or responsible Minister, as the case may be.

(2) Notwithstanding any other enactment or rule of law, it shall not be necessary to complete or register a transfer of shares of the kind referred to in subsection (1) of this section consequent upon a change in the person holding the office of Minister of Finance or responsible Minister, as the case may be.

(3) Each shareholding Minister may exercise all the rights and powers attaching to the shares in a State enterprise held by that Minister.

(4) A shareholding Minister may at any time or times, by written notice to the secretary of a State enterprise, authorise (on such terms and conditions as are specified in the notice) such person as the Minister thinks fit to act as the Minister's representative at any or all of the meetings of shareholders of the State enterprise or of any class of such shareholders, and any person so authorised shall be entitled to exercise the same powers on behalf of the Minister as the Minister could exercise if present in person at the meeting or meetings.

23. Transfer of Crown assets and liabilities to State enterprises—(1) Notwithstanding any Act, rule of law, or agreement, the shareholding Ministers for a State enterprise named in the Second Schedule to this Act may, on behalf of the Crown, do any one or more of the following:

- (a) Transfer to the State enterprise assets and liabilities of the Crown (being assets and liabilities relating to the activities to be carried on by the State enterprise);
- (b) Authorise the State enterprise to act on behalf of the Crown in providing goods or services, or in managing assets or liabilities of the Crown;
- (c) Grant to the State enterprise leases, licences, easements, permits, or rights of any kind in respect of any assets or liabilities of the Crown—

for such consideration, and on such terms and conditions, as the shareholding Ministers may agree with the State enterprise.

(2) The responsible Minister shall lay before the House of Representatives any contract or other document entered into pursuant to subsection (1) of this section within 12 sitting days after the date thereof.

(3) Assets that are fixed to, or are under or over, any land may be transferred to a State enterprise pursuant to this Act whether or not any interest in the land is also transferred. Where any such asset is so transferred, the asset and the land shall be regarded as separate assets each capable of separate ownership.

(4) Any asset or liability of the Crown may be transferred to a State enterprise pursuant to this Act whether or not any Act or agreement relating to the asset or liability permits such transfer or requires any consent to such a transfer.

(5) Where a transfer of the kind described in subsection (4) of this section takes place—

(a) The transfer shall not entitle any person to terminate, alter, or in any way affect the rights or liabilities of the Crown, or the State enterprise under any Act or agreement;

(b) Where the transfer is registrable, the person responsible for keeping the register shall register the transfer forthwith after written notice of the transfer is received by him or her from any person authorised for this purpose by the responsible Minister;

(c) The laying before the House of Representatives of any contract or other document relating to the transfer shall be deemed to be notice of the transfer, and any third party shall after the date of such contract or document deal with the State enterprise in place of the Crown;

(d) The Crown shall remain liable to any third party as if the asset or liability had not been transferred;

(e) Any satisfaction or performance by the State enterprise in respect of the asset or liability shall be deemed to be also satisfaction or performance by the Crown;

(f) Any satisfaction or performance in respect of the asset or liability by any third party to the benefit of the State enterprise shall be deemed to be also to the benefit of the Crown.

(6) No provision in any agreement limiting the Crown's right to sell any assets to third parties, or for determining the consideration for the sale of any assets to third parties, or obliging the Crown to account to any person for the whole or

part of the proceeds of sale by the Crown of any assets to third parties, or obliging the Crown to pay a greater price than otherwise by reason of or as a consequence of the sale of any assets to third parties, shall have any application or effect in respect of any agreement or transfer entered into or effected pursuant to or under this Act or pursuant to such an agreement or transfer.

(7) Where—

(a) Rights or obligations to provide goods or services to third parties are transferred to a State enterprise pursuant to this Act; and

(b) Those goods or services have previously been provided by the Crown on terms and conditions wholly or partly prescribed by any Act; and

(c) The Governor-General has by Order in Council declared that this subsection shall apply in respect of those goods or services—

the goods or services shall, to the extent that those terms and conditions are not already contained in contracts between the Crown and third parties, from the date of transfer be deemed to be provided pursuant to contracts between the State enterprise and the third parties (whether or not the Act is repealed). Each such contract shall be deemed to include such of the terms and conditions contained in that Act (with all necessary modifications), and such of the following provisions as are specified in the Order in Council:

(d) A condition permitting termination at any time by the third party on giving 14 days' notice to the State enterprise; and

(e) A condition permitting variation or termination at any time by the State enterprise on giving to the third party 1 month's notice in such manner (including newspaper advertising) as the State enterprise thinks fit.

(8) Where—

(a) Land, interests in land, licences, permits, or rights created on terms and conditions wholly or partly set out in any Act are transferred to a State enterprise pursuant to this Act; and

(b) The Governor-General has by Order in Council declared that this subsection shall apply in respect of that land or those interests, licences, permits, or rights—

then, whether or not the Act is repealed, such of the terms and conditions set out in the Act as are specified in the Order in

Council (with all necessary modifications) shall continue to apply in respect of that land or those interests, licences, permits, or rights after the transfer unless the State enterprise and the holders of that land or those interests, licences, permits, or rights otherwise agree.

(9) Where any designation or requirement under an operative district scheme is vested in a State enterprise pursuant to this Act, that designation or requirement shall continue to apply for as long as that district scheme is operative as if it had been granted to the State enterprise and, in respect of that designation or requirement, every reference to the Minister in section 117 of the Town and Country Planning Act 1977 shall be deemed to be a reference to the State enterprise concerned.

(10) Notwithstanding any other provision of this Act, where prior to the date on which this Act comes into force any Maori land was leased to the Crown under a lease administered by the Minister of Forests, the shareholding Ministers shall not, except with the consent of the lessor or where the lease so permits, transfer that leasehold interest to a State enterprise, but the shareholding Ministers may enter into an agreement with a State enterprise pursuant to subsection (1)(b) of this section to manage, on behalf of the Crown, its rights under that lease.

24. Provisions relating to transfer of land—

(1) Notwithstanding any other provision of this Act, Crown land within the meaning of the Land Act 1948 and any lands of the Crown other than lands registered under the Land Transfer Act 1952 that are to be transferred to a State enterprise pursuant to this Act shall—

(a) Be identified by an adequate legal description, or on plans lodged in the office of the Chief Surveyor for the land district in which the land is situated (being plans certified as correct for the purposes of this section by that Chief Surveyor); and

(b) Be approved by the Governor-General in Council and vest in the State enterprise pursuant to and on a date specified in an Order in Council made for the purposes of this section.

(2) Notwithstanding any other provision of this Act, no land which is subject to—

(a) A lease or licence pursuant to section 66 or section 66AA of the Land Act 1948; or

(b) Reservation from sale or disposition under section 58 of the Land Act 1948—

shall be transferred to a State enterprise.

(3) All land that is subject to the Land Act 1948 or the Forests Act 1949 and that is transferred to a State enterprise pursuant to this Act shall cease to be subject to the Land Act 1948 or the Forests Act 1949, as the case may be, from the date of that transfer, unless otherwise expressly provided by this Act or any other Act.

(4) Nothing in sections 40 to 42 of the Public Works Act 1981 shall apply to the transfer of land to a State enterprise pursuant to this Act, but sections 40 and 41 of that Act shall after that transfer apply to that land as if the State enterprise were the Crown and the land had not been transferred pursuant to this Act.

25. Title to land—(1) A District Land Registrar shall, on written application by any person authorised by a Minister and on payment of the prescribed fee,—

(a) Register a State enterprise as the proprietor, in substitution for the Crown, of the estate or interest of the Crown in any land that is incorporated in the register or otherwise registered in the land registry office of the land registration district concerned and that is transferred to the State enterprise pursuant to this Act; and

(b) Make such entries in the register and on any outstanding documents of title and generally do all such things as may be necessary to give effect to this section.

(2) A District Land Registrar shall, on written application by any person authorised by a Minister and on payment of the prescribed fee, issue a certificate of title for land vested in a State enterprise pursuant to section 24 (1) of this Act in form No. 1 in the First Schedule to the Land Transfer Act 1952, amended as appropriate.

(3) As soon as registration is accomplished in accordance with subsection (1) of this section or a certificate of title is issued in accordance with subsection (2) of this section, the State enterprise shall be deemed to be seized of an estate in fee simple in possession in respect of that land.

(4) Applications in accordance with subsections (1) and (2) of this section shall specify the name of the State enterprise and the date of the agreement, together with a description of the land sufficient to identify it and, in the case of applications

under subsection (2) of this section, a certificate by the Chief Surveyor for the district concerned as to the correctness of such description.

26. Land certification—(1) Before a District Land Registrar issues a certificate of title in respect of any land vested in a State enterprise pursuant to section 24 (1) of this Act, the District Land Registrar shall request from the Director-General of Survey and Land Information a certificate in the form set out in the Second Schedule to the Land Act 1948 as to the legal description of the land, any trusts, reservations, or restrictions affecting the land, and any other matters that the District Land Registrar considers appropriate.

(2) Where any land that has been vested in a State enterprise pursuant to section 24 (1) of this Act and for which no certificate of title has been issued in the name of that enterprise, is to be transferred to any other person, the District Land Registrar shall, before issuing a certificate of title, request from the Director-General of Survey and Land Information a certificate in the form set out in the Second Schedule to the Land Act 1948 as to the legal description of the land, any trusts, reservations, or restrictions affecting the land and any other matters that the District Land Registrar considers appropriate.

(3) A certificate in accordance with subsection (1) or subsection (2) of this section shall be filed by the District Land Registrar in the Land Registry Office and shall be conclusive evidence to the District Land Registrar of the matters required to be stated therein.

27. Maori land claims—(1) Where land is transferred to a State enterprise pursuant to this Act and, before the day on which this Act receives the Governor-General's assent, a claim has been submitted in respect of that land under section 6 of the Treaty of Waitangi Act 1975, the following provisions shall apply:

- (a) The land shall continue to be subject to that claim:
- (b) Subject to subsection (2) of this section, the State enterprise shall not transfer that land or any interest therein to any person other than the Crown:
- (c) Subject to subsection (2) of this section, no District Land Registrar shall register the State enterprise as proprietor of the land or issue a certificate of title in respect of the land.

(2) Where findings have been made pursuant to section 6 of the Treaty of Waitangi Act 1975 in respect of land which is held by a State enterprise pursuant to a transfer made under this Act (whether or not subsection (1) of this section applies to that land), the Governor-General may, by Order in Council,—

- (a) Declare that all or any part of the land shall be resumed by the Crown on a date specified in the Order in Council; or
- (b) In the case of land to which subsection (1) of this section applies, waive the application of paragraphs (b) and (c) of that subsection to all or any part of the land.
- (3) Where any land is to be resumed pursuant to subsection (2) (a) of this section—

- (a) The State enterprise shall transfer the land to the Crown on the date specified in the Order in Council; and
- (b) The Crown shall pay to the State enterprise an amount equal to the value of the interest of the State enterprise in the land (including any improvements thereon). The amount of any such value shall be that agreed between the State enterprise and its shareholding Ministers or, failing agreement, that determined by a person approved for this purpose by the State enterprise and its shareholding Ministers.

28. Orders in Council relating to transfer of assets and liabilities—(1) For the purpose of facilitating the transfer of assets and liabilities to a State enterprise pursuant to this Act, the Governor-General may from time to time, by Order in Council, do any one or more of the following:

- (a) Vest in or impose on a State enterprise any asset or liability (other than land to which section 24 (1) of this Act applies), or any class of any such asset or liability, that the State enterprise has agreed to have transferred to it;
- (b) Vest land in a State enterprise for the purposes of section 24 (1) of this Act;
- (c) Declare that a reference to the Crown or a Minister, officer, employee, department, or instrument of the Crown in any or all regulations, orders, notices, or documents shall be deemed to be or to include a reference to a State enterprise specified in the order;
- (d) Declare that a State enterprise shall assume or continue to have the rights and obligations of the Crown or a Minister, officer, employee, department, or

instrument of the Crown in respect of applications for rights, objections, or proceedings before any court, authority, or other person, being rights and obligations that the State enterprise has agreed to assume:

- (e) Declare that sections 294 to 294I of the Local Government Act 1974 (which relate to reserve contributions, development levies, and contributions to certain regional works) shall not apply to specified developments, being developments that the shareholding Ministers have agreed to transfer to a State enterprise pursuant to this Act:
 - (f) Declare, in respect of any assets or liabilities transferred to a State enterprise pursuant to this Act, that the State enterprise shall be deemed to have specified rights or obligations in respect of those assets or liabilities, being rights or obligations that are required in respect of those assets or liabilities as a result of the change of ownership or responsibility from the Crown to the State enterprise:
 - (g) Declare that any Order in Council made under this section shall be deemed to be notice to all persons, and that specific notice need not be given to any authority or other person:
 - (h) Direct any authority or other person to register or record any such vesting or declaration.
- (2) Every Order in Council made under this section may be made on such terms and conditions as the Governor-General thinks fit, and shall have effect according to its tenor.

29. Interpretation relating to transfer of assets and liabilities—(1) In this section and in sections 23 to 28 of this Act, unless the context otherwise requires,—

“Agreement” includes a deed, a contract, an agreement, an arrangement, and an understanding, whether oral or written, express or implied, and whether or not enforceable at law:

“Assets” means any real or personal property of any kind, whether or not subject to rights, and without limiting the generality of the foregoing includes—

- (a) Any estate or interest in any land, including all rights of occupation of land or buildings:
- (b) All buildings, vehicles, plant, equipment, and machinery, and any rights therein:

(c) All livestock, products from livestock, and crops:

(d) All securities within the meaning of the Securities Act 1978:

(e) All rights of any kind, including rights under Acts, deeds, agreements, or licences, planning rights, water rights, and clean air licences, and all applications for and objections against applications for such rights:

(f) All patents, trade marks, designs, copyright, and other intellectual property rights whether enforceable by Act or rule of law:

(g) Goodwill, and any business undertaking:

(h) All natural gas, petroleum, and other hydrocarbons:

“Liabilities” includes—

(a) Liabilities and obligations under any Act or agreement; and

(b) Deposits and other debt securities within the meaning of the Securities Act 1978; and

(c) Contingent liabilities:

“Rights” includes powers, privileges, interests, licences, approvals, consents, benefits, and equities of any kind, whether actual, contingent, or prospective:

“State enterprise” includes a subsidiary of a State enterprise:

“Transfer” includes—

(a) Assign and convey; and

(b) Vest by Order in Council; and

(c) Confer estates in fee simple of land held by the Crown, whether in allodium or otherwise; and

(d) Grant leases, rights, and interests in any real or personal property; and

(e) In the case of liabilities, the assumption thereof by a State enterprise.

(2) In this section and in sections 23 to 28 of this Act, a reference to “transfer”, “authorise”, or “grant” includes entering into an agreement to transfer, authorise, or grant, as the case may be.

(3) This section and sections 23 to 28 of this Act shall have effect, and assets and liabilities may be transferred pursuant to this Act, notwithstanding any restriction, prohibition, or other provision contained in any Act, rule of law, or agreement that would otherwise apply.

(4) Nothing in this Act shall limit any powers or rights that the Crown or a Minister has other than pursuant to this Act.

30. Application of Companies Act 1955 to new State enterprises—(1) Notwithstanding anything in the Companies Act 1955, the Reserve Bank of New Zealand Act 1964, or any other enactment or rule of law, a company in which all the shares are subscribed for by Ministers may be formed and registered under the Companies Act 1955 with a name specified in the Second Schedule to this Act; and sections 31 and 32 (2) of the Companies Act 1955 shall not apply to any such company.

(2) Notwithstanding the Companies Act 1955, the Minister of Finance and a responsible Minister may form a limited liability public company that is named in the Second Schedule to this Act as if the reference to the figure "7" in section 13 (1) of the Companies Act 1955 were a reference to the figure "2".

(3) In the application of the Companies Act 1955 to a company named in the Second Schedule to this Act, the following provisions of the Companies Act 1955 shall be construed as if references therein to 7 members were references to 2 members:

- (a) Section 41, as to carrying on business when the number of members is reduced below the legal minimum;
- (b) Section 217 (d), as to winding up by the Court when the number of members is reduced below the legal minimum;
- (c) Section 219 (a) (i), as to the presentation of a winding-up petition by a contributory when the number of members is reduced below the legal minimum.

(4) Nothing in section 134 of the Companies Act 1955 (which relates to statutory meetings) shall apply to a company named in the Second Schedule to this Act.

31. Review of Ombudsmen Act 1975 and Official Information Act 1982 in relation to State enterprises—The effect of the Ombudsmen Act 1975 and the Official Information Act 1982 on the operation of State enterprises shall be reviewed after the 1st day of April 1989 by a select committee appointed by the House of Representatives for this purpose. The committee shall report to the House of Representatives before the 1st day of April 1990, and shall state in its report—

- (a) Whether, in its view, either or both of those Acts should continue to apply to State enterprises; and

- (b) If it considers that either or both Acts should so continue, the changes (if any) that should be made to either or both of those Acts so far as they apply to State enterprises.

32. Amendments and transitional provisions relating to new State enterprises—(1) The enactments specified in the Third and Fifth Schedules to this Act are hereby amended in the manner indicated in those Schedules.

(2) During the period beginning on the 1st day of April 1987 and ending with the close of the 31st day of December 1987,—

- (a) The enactments specified in the Fourth Schedule to this Act shall have effect as stated in that Schedule; and
- (b) The Town and Country Planning Act 1977 and the Public Works Act 1981 shall have effect as if every State enterprise named in the Second Schedule to this Act were the Crown and every work and every use of land which such a State enterprise constructs, undertakes, establishes, manages, operates, or maintains by virtue of any Act were a public work within the meaning of the Public Works Act 1981.

(3) Where, by virtue of subsection (2) of this section, a State enterprise has any power, right, or authority that it would not otherwise have, the responsible Minister may at any time or times, by notice in the *Gazette*,—

- (a) Direct the State enterprise not to exercise that power, right, or authority; or
- (b) Impose conditions on the exercise of that power, right, or authority,—

either generally or in any particular case or cases.

(4) Every State enterprise shall comply with a notice given under subsection (3) of this section; and every such notice shall be deemed to be a regulation for the purposes of the Regulations Act 1936.

33. Repeals—The enactments specified in the Sixth Schedule to this Act are hereby repealed.

Examined and certified:

No. 117

Clerk of the House of Representatives

In the name and on behalf of Her Majesty Queen Elizabeth
the Second I hereby assent to this Act this day
of 19

Governor-General

STATE-OWNED ENTERPRISES AMENDMENT

ANALYSIS

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|---|---|
| <p>Title</p> <ol style="list-style-type: none">1. Short Title and commencement2. Interpretation3. Ministers may hold shares and equity bonds in new State enterprises4. State enterprise equity bonds5. Provision of information by State enterprises | <ol style="list-style-type: none">6. Transfer of Crown assets and liabilities to State enterprises7. Provisions relating to transfer of land8. Land certification9. Transitional arrangements10. First Schedule11. Consequential amendments12. Repeals consequential upon provisions of principal Act Schedules |
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An Act to amend the State-Owned Enterprises Act 1986
BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title and commencement—(1) This Act may be cited as the State-Owned Enterprises Amendment Act 1987, and shall be read together with and deemed part of the State-Owned Enterprises Act 1986 (hereinafter referred to as the principal Act).

(2) Except as provided in sections 10 and 11 of this Act, this Act shall be deemed to have come into force on the 1st day of * April 1987.

2. Interpretation—(1) Section 2 of the principal Act is hereby amended by inserting, after the definition of the term "Crown", the following definition:

"'Equity bond' means a State enterprise equity bond issued pursuant to section 12 of this Act."

(2) Section 2 of the principal Act is hereby further amended by adding to paragraph (a) of the definition of the term "share" the words "(but, except in sections 14 and 22 of this Act, does not include an equity bond)".

(2) Section 23 of the principal Act is hereby further amended by repealing subsection (9), and substituting the following subsections:

~~“(9) Where a designation under an operative district scheme is vested in a State enterprise pursuant to this Act—~~

“(a) The designation shall remain in force until the next review of the district scheme, and shall then lapse; and

“(b) Sections 82 and 83 and Part VI of the Town and Country Planning Act 1977 shall apply to the designation as if the State enterprise were a local authority and had made the requirement consequent upon which the designation was made:

“Provided that where the designation was made under section 43 (1) (d) or section 118 (1) (d) of the Town and Country Planning Act 1977 the designation shall be included in the district scheme when it is next reviewed.

~~“(9A) Where any land is transferred under this section but the designation in respect of that land is not vested pursuant to this Act, any use of that land which is established at the date of the transfer shall be deemed to be a use permitted as of right under the Town and Country Planning Act 1977 until the next review of the operative district scheme. To the extent that any use which would be lawful under the designation has not been established by the date of the transfer of the land, the designation shall be deemed to be a consent under Part IV of the Town and Country Planning Act 1977 granted as at the date of transfer and section 70 of that Act shall apply accordingly.~~

~~“(9B) Where any requirement has been made under section 43 or section 118 of the Town and Country Planning Act 1977 in respect of any work which has been transferred to a State enterprise pursuant to this Act, the procedures specified in the Town and Country Planning Act 1977 may be completed as if the Minister of Works and Development continued to be financially responsible for the work and as if the work were a public work.”~~

7. Provisions relating to transfer of land—(1) Section 24 (2) of the principal Act is hereby amended by adding the words “pursuant to section 23 (1) (a) of this Act”.

(2) Section 24 of the principal Act is hereby further amended by adding the following subsection:

(2) This section shall come into force on the day on which this Act receives the Governor-General's assent.

11. Consequential amendments—(1) The enactments specified in the First Schedule to this Act are hereby amended in the manner indicated in that Schedule.

(2) Part A of the First Schedule to this Act shall be deemed to have come into force on the 1st day of April 1987.

(3) Part B of the First Schedule to this Act shall come into force on the day on which this Act receives the Governor-General's assent.

(4) Part C of the First Schedule to this Act shall come into force on the 1st day of January 1988.

12. Repeals consequential upon provisions of principal Act—The enactments specified in the Second Schedule to this Act are hereby repealed.

SCHEDULES

FIRST SCHEDULE ENACTMENTS AMENDED

Section 11 (1)

Part A

(Which is deemed to have come into force on the 1st day of April 1987)

Title	Amendment
1937, No. 27—The Petroleum Act 1937 (R.S. Vol. 7, p. 647)	By omitting from section 4 (2) (b) (as amended by section 65 (1) of the Conservation Act 1987), the words "the Minister within the meaning of section 2 (1A) of the Harbours Act 1950", and substituting the words "the Ministers of Transport and Conservation".
1947, No. 35—The Masterton Licensing Trust Act 1947 (R.S. Vol. 3, p. 445)	By omitting from section 42 (b) the words "Post Office Savings Bank", and substituting the words "Post Office Bank Limited".
1948, No. 63—The Valuers Act 1948 (R.S. Vol. 11, p. 723)	By omitting from section 37 (7) the words "in the Post Office Savings Bank or".

The Companies Act 1955

MEMORANDUM OF ASSOCIATION

- of -

TELECOM CORPORATION OF NEW ZEALAND LIMITED

A Public Company Limited by Shares

1. THE name of the company is TELECOM CORPORATION OF NEW ZEALAND LIMITED.

2. THE liability of the members is limited.


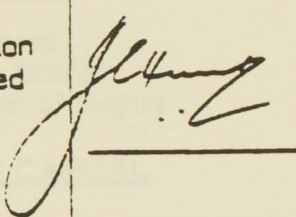
3. THE share capital of the Company is one hundred thousand dollars (\$100,000.00) divided into one hundred thousand (100,000) Ordinary Shares of one dollar (\$1.00) each.

WE, the several persons whose names, addresses and descriptions are subscribed hereto are desirous of being formed into a Company in pursuance of this Memorandum of Association and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names.

DATED this 24th day of February

1987

ARTICLES OF ASSOCIATION

Name in full Description Address	Signature	No. of Shares Taken by Each Subscriber	Witness
ROGER OWEN DOUGLAS Minister of Finance Parliament Buildings WELLINGTON		1000	Cathie Hay Private Secretary Wellington
JONATHAN LUCAS HUNT Minister responsible for Telecom Corporation of New Zealand Limited Parliament Buildings WELLINGTON		1000	Marie Coloney Private Secretary Wellington

ARTICLES OF ASSOCIATION

of

TELECOM CORPORATION OF NEW ZEALAND LIMITED

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